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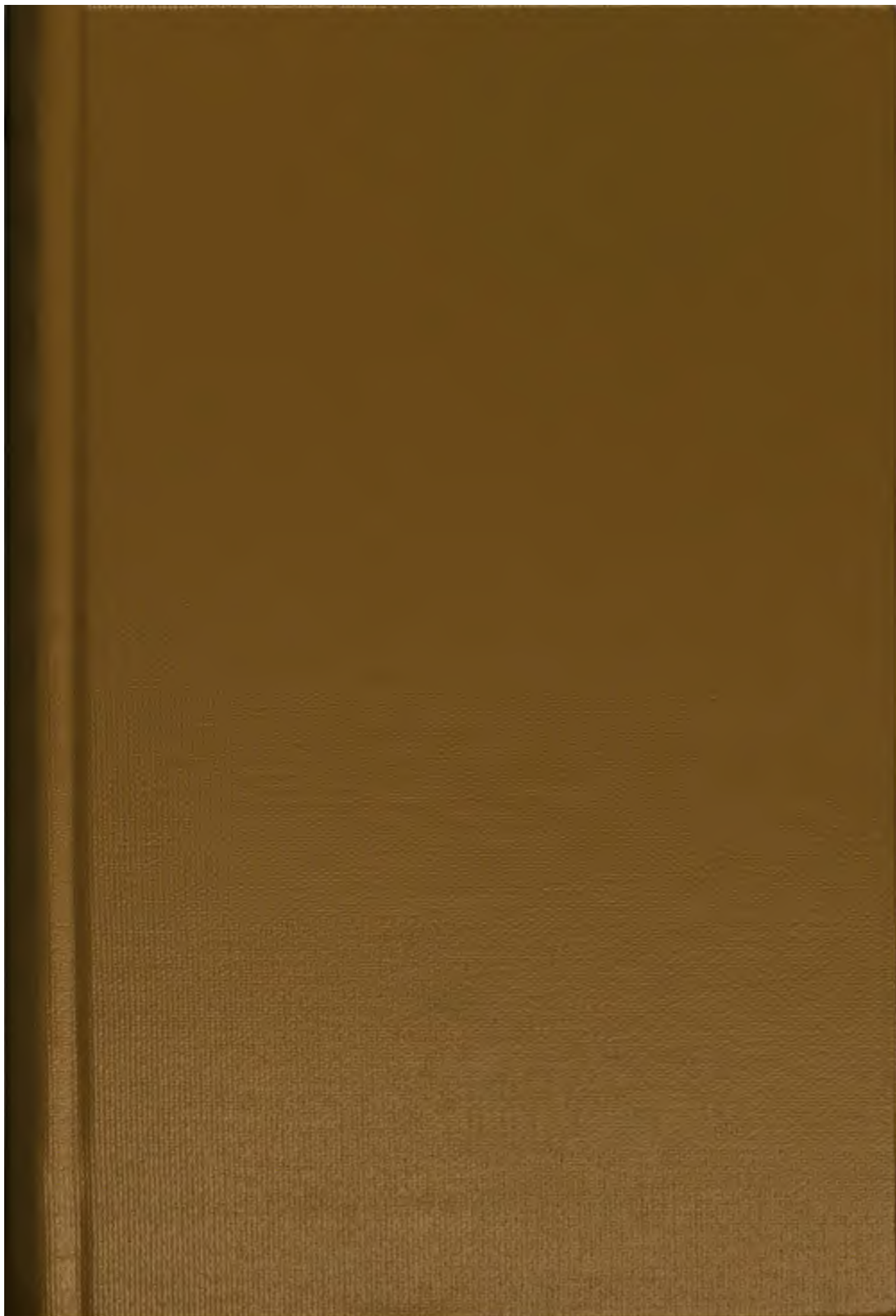
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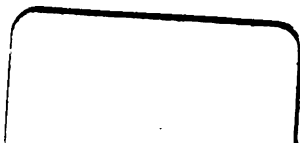
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A TREATISE

Copy 2.

ON

# THE LAW OF SALES

OF

PERSONAL PROPERTY,

INCLUDING THE LAW OF

CHATTEL MORTGAGES.

BY

CHRISTOPHER G. TIEDEMAN,

*Author of "Real Property," "Commercial Paper," Etc., Etc.*

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## P R E F A C E.

In sending to the press this treatise on the law of Sales of Personal Property, it will not be necessary to enter into any lengthy explanation of the purpose or scope of the volume. The subject is not a new one, and yet there can be no doubt that on that subject a comprehensive treatise of a distinctively American type is needed. And the author believes that in the present volume he is supplying this want. The treatise is constructed on the plan which presumably accounts for the flattering reception which the profession has accorded to his works on "Real Property" and "Commercial Paper," and the author has attempted to reproduce in this volume the same conciseness and clearness of statement.

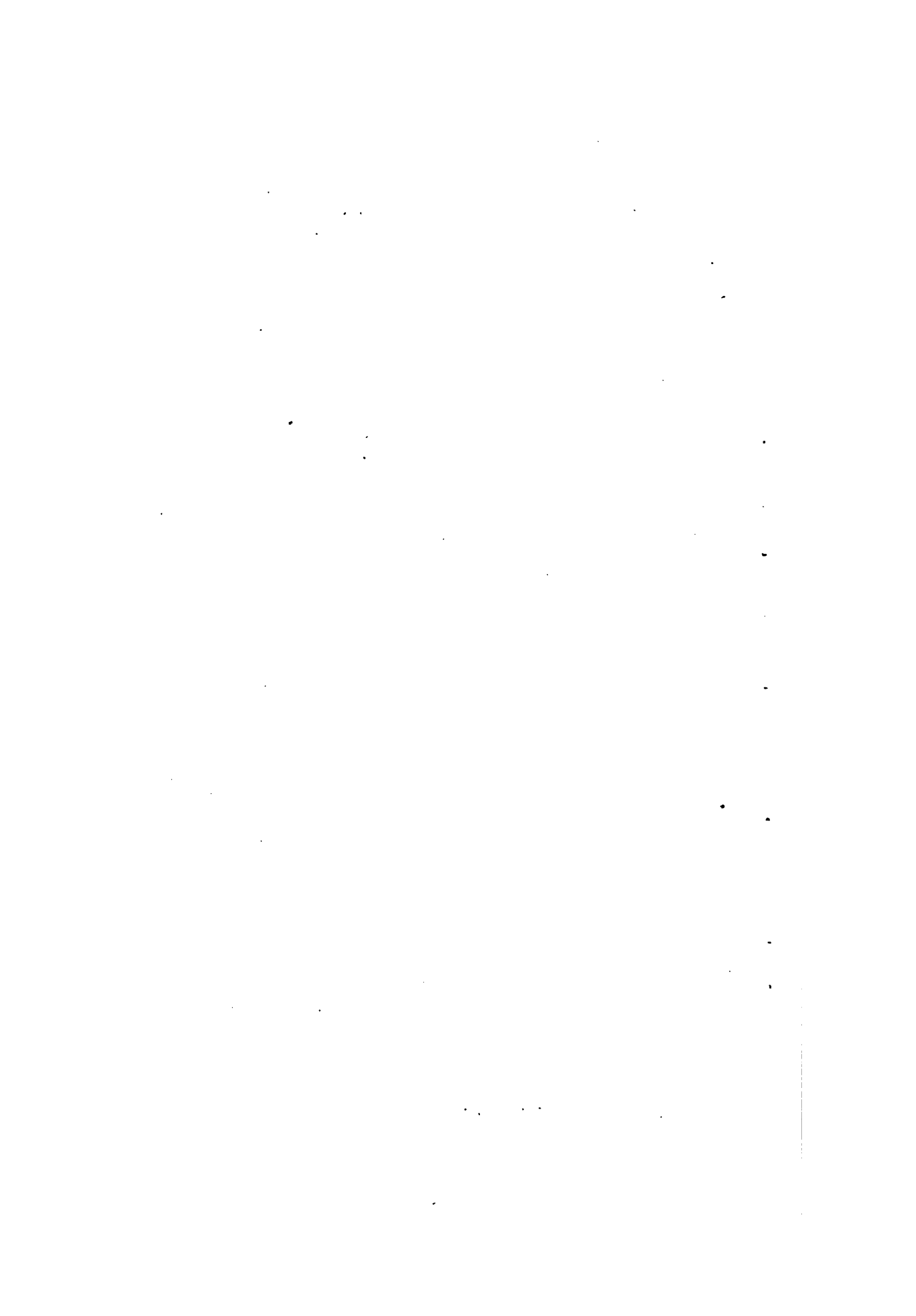
The table of contents will disclose the fact that the book includes besides what ordinarily appears in other treatises, special discussions of Chattel Mortgages — which is only one kind of conditional sales — Involuntary and Judicial Sales, Auction Sales, Sales by Agents and Personal Representatives, and the Rights of *Bona Fide* Purchasers, thus introducing new features, which, it is believed, add materially to the value of the book. The discussion of chattel mortgages in this connection makes the book particularly valuable as a text-book in the law schools, as it dispenses with the use of a separate text-book on that subject.

As in the case of the other works of the author, the attempt is made in the present instance to make the book equally valuable to the busy practitioner by the addition of extensive citations of authorities, and clear differentiations of the legal points settled by them.

C. G. T.

UNIVERSITY OF MISSOURI,  
COLUMBIA, MO., Jan. 21, 1891.





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# THE LAW OF SALES

OF

## PERSONAL PROPERTY.

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### CHAPTER I.

#### DEFINITION AND ESSENTIAL ELEMENTS OF SALES.

##### SECTION 1. Sale defined.

2. Elements of the contract of sale.
3. Sale distinguished from bailments.
4. Sale distinguished from pledges.
5. Sale and return, distinguished from bailments with right of purchase.
6. Sale distinguished from contract to manufacture and return.
7. Sale distinguished from depositum — Warehouses and grain elevators.
8. Sale distinguished from consignment.
9. Sale distinguished from lease or hiring.
10. Sale distinguished from mortgage.
11. Sale distinguished from gift.
12. Sale distinguished from exchange or barter.
13. Sale distinguished from assignment.

§ 1. **Sale defined.** — In the sense in which the term is to be employed in this book, a sale may be defined to be a contract or agreement for the transfer of the absolute property in personalty from one person to another for a price in money.<sup>1</sup> This definition does not agree with those

<sup>1</sup> This is substantially the definition of Chancellor Kent, in 2 Kent's Com. 468, with the exception that his definition is broad enough to include barter or exchanges, the stipulation of his definition being that the contract must be "for a valuable consideration." See, also, to the same effect, 2 Abbott's Law Dict., Tit. Sale, p. 442; *Cunningham v. Ash-*

§ 1 DEFINITION, ESSENTIAL ELEMENTS OF SALES. [CH. I.]

given in all of the authorities, many of them defining sale to be a transfer of personal property, instead of being a contract for the transfer of such property.<sup>1</sup> But this variance in the definitions is not material, although the latter is somewhat confusing and misleading. For, when they have left the consideration of the definition, the judicial and treatise writers concur without exception in speaking of executory and executed sales, and in pointing out when in the course of negotiation the title passes. The sale is executed when the title is transferred, and executory when the transfer has not yet occurred. An executory sale is therefore a contract for the transfer of property. The transfer of title is the execution of that contract.

A parallel illustration of the character of the definition, adopted in the present treatise, is to be found in a lease of lands. The lease itself is an executory contract for the transfer of an estate less than freehold in lands, and not the conveyance itself. The estate is created and transferred by the execution of the lease, viz., by the delivery of the land, or by the lawful acquisition by the lessee of the possession of the land.<sup>2</sup> So, in the law of sales of personal property, the sale is the executory agreement for the transfer of the absolute property in a thing, and the conveyance consists of the execution of this agreement.

brooke, 20 Mo. 553, 556; *Williamson v. Berry*, 8 How. 495, 544; *Edwards v. Cottrell*, 43 Iowa, 194, 204; *Hutmacher v. Harris*, 88 Pa. St. 491, 498; *Bigley v. Risher*, 63 Pa. St. 152, 155; *Mackness v. Long*, 85 Pa. St. 158. This is also the sense in which the word is used in the Roman law. *Bell on Sale*, 9; *Cunningham v. Ashbrooke*, 20 Mo. 553, 557. See, also, *Story on Sales*, § 2, *et seq.*

<sup>1</sup> "It [a sale of personal property] may be defined to be a transfer of the absolute or general property in a thing for a price in money. *Benjamin on Sales*, § 1. Blackstone defines a sale to be "a transmutation of property from one man to another in consideration of some price." 2 Bl. Com. 446. See, to the same effect, *Martin v. Adams*, 104 Mass. 262; *Wittowski v. Wasson*, 71 N. C. 451; *Smith v. Weaver*, 90 Ill. 392; *Story on Sales*, § 1; *Creveling v. Wood*, 95 Pa. St. 152, 158.

<sup>2</sup> *Tiedeman on Real Property*, § 174.

CH. I.] DEFINITION, ESSENTIAL ELEMENTS OF SALES. § 3

In the use of the word *sale* in this sense, there is no incongruity in speaking of *executory* and *executed* sales. Whereas, if a sale is the transfer itself of personal property, then there is no such thing as an executory sale.

§ 2. **Elements of the contract of sale.** — The essential elements of the contract of sale, are, 1st, parties competent to contract, 2d, mutual consent, 3d, the absolute property in a thing, which is the subject of the transfer; 4th, a price in money. These different elements are to receive special treatment in subsequent chapters; but in order that the real character of a sale may from the beginning be understood and differentiated from other similar but different transactions, it is necessary that the attention of the reader should be directed immediately to the third and fourth elements.

§ 3. **Sale distinguished from bailments.** — The third element requires that, to constitute a sale, the absolute property in a thing must be transferred. If the property in the thing, which is transferred, is special, the transaction is not a sale, but a bailment. In every such case the necessity of distinguishing between a sale and a bailment is specially felt in determining on whom the loss falls, where the thing is accidentally destroyed or injured. If the transaction was a sale, any subsequent loss would fall on the transferee or buyer, but if it was a bailment, the loss falls on the transferrer or bailor, unless the loss was occasioned by the negligence of the bailee.<sup>1</sup> In doubtful cases, a sale is to be distinguished from a bailment by the fact that the

<sup>148</sup>  
<sup>1</sup> See *Hunt v. Wyman*, 100 Mass. ~~232~~, where a horse was delivered to one, with the understanding that if the horse suited him, he would take it, otherwise he would return it in as good condition as he got it. Before he had had an opportunity to try the horse, and without any fault on his part, the horse was injured so seriously that the party receiving him for trial was unwilling to keep him. The transaction was held to be a bailment, and the loss to fall upon the bailor.



§ 4 DEFINITION, ESSENTIAL ELEMENTS OF SALES. [CH. I.]

identical thing delivered or to be delivered is to be restored to the original owner. In that case, the person to whom the thing is delivered does not become the absolute owner. He acquires only a special property in it, which is given to him, to enable him to do with it what is called for by his contract. If the identical thing is not returned, then it must have become the property of the person to whom it was delivered; and, since something else of value is returned to the original owner, the transaction must be an exchange or sale, according to the circumstances. It is ordinarily easy to determine whether a transaction is a sale or bailment. It is not difficult in the case of

§ 4. Pledges, — given to secure the payment of a debt, or the performance of some other obligation, — to determine that the transaction is a bailment, and that the thing pledged continues to be the general property of the pledgor, until the pledgee exercises the conceded power to sell the pledge absolutely in satisfaction of his claim, when the property of the pledgor passes to the purchaser.<sup>1</sup> And it is also held that an absolute bill of sale may be shown by parol evidence to have been intended as a pledge, instead of a sale.<sup>2</sup> But the fact that a transferee agrees to account to the transferrer for any excess of price obtained by a subsequent sale of the thing does not prevent the transaction from being a sale.<sup>3</sup> The pledge must also be differentiated from a conditional sale with the right to repurchase.<sup>4</sup>

<sup>1</sup> *Cortelyou v. Lansing*, 2 Caines Cas. 202; *Whitaker v. Sumner*, 20 Pick. 405; *Morgan v. Dodd*, 3 Col. 553; *Houser v. Kemp*, 3 Pa. St. 208, 210; *Shaw v. Wiltshire*, 65 Me. 485, 492; *Hazard v. Loring*, 10 Cush. 267; *Walker v. Staples*, 5 Allen, 34; *Eastman v. Every*, 23 Me. 248; *Beeman v. Lawton*, 37 Me. 543.

<sup>2</sup> *Kimball v. Hildreth*, 8 Allen, 167; *Jones v. Rahilly*, 16 Minn. 323; *Harper v. Ross*, 10 Allen, 332; *Newton v. Fay*, 10 Allen, 505, 507; *Rennock v. McCormick*, 120 Mass. 275, 277.

<sup>3</sup> *Reeves v. Seeburn*, 16 Iowa, 237.

<sup>4</sup> *Commonwealth v. Reading Sav. Bank*, 137 Mass. 431, 443; *Pomez v. Camors*, 36 La. An. 464, 465. See *post*, §§ 204, 223.

§ 5. **Sale and return, distinguished from bailment with right of purchase.**<sup>1</sup> — But a delivery of personal property with the right to return is not always a bailment. If the thing is delivered for the purpose of inspection and trial, with the understanding that if it is suitable and satisfactory, the thing is to become the property of the transferee, otherwise to be returned to the original owner, the transaction is a bailment, until the transferee has exercised his right of election to make the thing his property, when the transaction constitutes a sale.<sup>2</sup> However, if the transferee detains the thing beyond a reasonable time, without any attempt to return it, he will be presumed to have elected to keep it, and the sale thus becomes complete.<sup>3</sup> But if the parties agree to a present transfer of the absolute title, with the privilege of returning the thing, if it is not suitable or satisfactory, then the transaction is one of sale and return, and the absolute title passes immediately, subject to the right to rescind the sale, and return the thing.<sup>4</sup> But the character of such a transaction may be completely controlled by special agreements, whatever may be the peculiar facts of the case. If the parties expressly agree that the title

<sup>1</sup> See *post*, §§ 204, 223.

<sup>2</sup> *Enlow v. Klein*, 79 Pa. St. 488, 490; *Rose v. Story*, 1 Barr, 190; *McCullough v. Porter*, 4 Watts & S. 177; *Clark v. Jack*, 7 Watts & S. 375; *Lehigh Co. v. Field*, 8 Watts & S. 323; *Becker v. Smith*, 9 Pa. St. 469; *Rowe v. Sharpe*, 51 Pa. St. 346; *Hunt v. Wyman*, 100 Mass. 198; *Wartman v. Breed*, 117 Mass. 18; *Daudo v. Foulds*, 105 Pa. St. 74; *Chamberlain v. Smith*, 44 Pa. St. 481; *Wilson v. Stratton*, 47 Me. 120; *Elphick v. Barnes*, 5 C. P. Div. 321; *Kahn v. Clabrunda*, 50 Wis. 235.

<sup>3</sup> See *Moss v. Sweet*, 16 Q. B. 493; *Washington v. Johnson*, 7 Humph. 468; *Quinn v. Stout*, 81 Mo. 160; *Ray v. Thompson*, 12 Cush. 201; *Johnson v. McLane*, 7 Blackf. 501; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Fuller v. Buswell*, 84 Vt. 108; *Moore v. Piercy*, 1 Jones (N. C.), 181.

<sup>4</sup> *McKinney v. Bradlee*, 117 Mass. 321; *Slutz v. Desenberg*, 28 Ohio St. 372; *Mahler v. Schloss*, 7 Daly, 291; *Marsh v. Wickham*, 14 Johns. 167; *Dearborn v. Turner*, 16 Me. 17; *Buswell v. Bicknell*, 17 Me. 344; *Holbrook v. Armstrong*, 10 Me. 31; *Perkins v. Douglass*, 20 Me. 317; *Walker v. Blake*, 37 Me. 373; *Colton v. Wise*, 7 Bradw. 395; *Schlesinger v. Stratton*, 9 R. I. 578; *Middleton v. Stone*, 111 Pa. St. 589.

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shall or shall not pass upon the delivery of the thing, the transaction will be a sale or bailment respectively.<sup>1</sup> But, in the absence of such an express agreement, the intention of the parties will govern the construction, as it is manifested by the general terms of the contract.

§ 6. **Sale distinguished from contract to manufacture and return.** — The cardinal test of a bailment, as already stated, is whether the identical thing, which is delivered, is to be returned. If it is to be returned, and not some equivalent, the transaction is a bailment, it matters not how much the form of the thing may have been changed by the labor of the transferee. Thus, the transaction is a bailment, if leather is delivered and made into shoes, grain into meal or flour, lumber into boards, wool or cotton into cloth, or cloth into clothes, whenever the contract calls for the return of the identical thing in its changed form.<sup>2</sup> And the agreement to pay a certain sum if the goods are not returned, does not *per se* change the transaction into a sale.<sup>3</sup>

But if, in the delivery of the raw material to the manufacturer or artisan, the agreement does not call for the return of the articles which were manufactured out of the identical raw material which had been delivered, but merely for articles of the kind described equal in value to the raw material which had been delivered but made out of any material of the same kind, then the transaction is not a bailment, but an exchange or sale, according to the circum-

<sup>1</sup> Coggill v. Hartford, etc., R. R. Co., 3 Gray, 545, 548; Crocker v. Gullifer, 44 Me. 491.

<sup>2</sup> Barker v. Roberts, 8 Greenl. 101; Schenck v. Sounders, 13 Gray, 37; Mansfield v. Converse, 8 Allen, 182; Eldridge v. Benson, 7 Cush 483; Bulkley v. Andrews, 39 Conn. 70; Stephenson v. Ranney, 2 Up. Can. C. P. 196; Isaac v. Andrews, 28 Up. Can. C. P. 40; Pierce v. Schenck, 3 Hill, 28; Mallory v. Willis, 4 N. Y. 76; Foster v. Pettibone, 7 N. Y. 493; Ashby v. West, 3 Ind. 170; Irons v. Kentner, 51 Iowa, 88; Hyde v. Cookson, 21 Barb. 92; Brown v. Hitchcock, 28 Vt. 452.

<sup>3</sup> Westcott v. Thompson, 18 N. Y. 363.

stances.<sup>1</sup> And the complications of a particular transaction will not affect the result in the slightest. The single test, given above, determines the result in every case. Thus, in the case of *Jenkins v. Eichelberger*,<sup>2</sup> the transaction was held to be a sale and not a bailment, where hides were delivered by a merchant to a tanner under a contract that they were to be charged to the tanner at cost and a certain commission, and interest after a specified time; and when tanned the hides were to be returned to the merchant, to be sold by him, who would, after deducting the cost, commission, etc., pay the balance to the tanner: the first part of the contract constituted a sale from the merchant to the tanner; while the second part constituted a consignment from the tanner to the merchant. But in all these cases a special agreement that the goods were to remain at the owner's risk, would prevent the title from passing on delivery, and as long as they were not appropriated by the person to whom they were delivered. But such an agreement cannot change the transaction into a bailment, as seems to be the ruling in several cases,<sup>3</sup> as long as the contract does not call for the return of the identical things.

<sup>1</sup> *Ewing v. French*, 1 Blackf. 354; *Smith v. Clark*, 21 Wend. 83; 34 Am. Dec. 213; *Hurd v. West*, 7 Cow. 752; *Buffum v. Merry*, 3 Mass. 478; *Chase v. Washburn*, 1 Ohio St. 244; *Carlisle v. Wallace*, 12 Ind. 252; *Rahilly v. Wilson*, 3 Dill. 420; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 37 Ill. 556; *Grier v. Stout*, 2 Bradw. 602; *Jones v. Kemp*, 49 Mich. 9; *Fishback v. Van Dusen*, 33 Minn. 111; *Baker v. Woodruff*, 2 Barb. 520; *Norton v. Woodruff*, 2 N. Y. 153; *Tilt v. Silverthorne*, 11 Up. Can. Q. B. 619; *Good v. Winslow*, 4 Allen N. B. 241; *Johnston v. Brown*, 37 Iowa, 200; *Marsh v. Titus*, 3 Hun, 550; *McCabe v. McKinstry*, 5 Dill. 509; *Benedict v. Ker*, 29 Up. Can. C. P. 410; *South Australian Ins. Co. v. Randall*, L. R. 3 P. C. C. 101; *Austin v. Seligman*, 21 Blatchf. 506; *Jenkins v. Eichelberger*, 4 Watts, 121 (28 Am. Dec. 691, 692).

<sup>2</sup> 4 Watts, 121 (28 Am. Dec. 691).

<sup>3</sup> See *Nelson v. Brown*, 44 Iowa, 455; 53 Iowa, 555; *Sexton v. Graham*, 53 Iowa, 183; *Ledyard v. Hibbard*, 48 Mich. 421

§ 7. Sale distinguished from depositum — Warehouses and grain elevators. — A *depositum*, like every other kind of bailment, requires the return of the identical thing. In the ordinary deposit for safe keeping, there is no doubt that the transaction is a bailment, for the identical thing is to be returned, and it does not matter much what the thing may be.<sup>1</sup> But where the identical thing is not to be returned, but only an equivalent, the general rule requires the transaction to be pronounced a sale.<sup>2</sup> The doubt has arisen in the application of the test to the deposit of grain in the elevators, with the understanding that the grain will be deposited in the same bins with other grain of the same quality and kind, and that the depositor will be entitled on demand, not to the identical grain which he has deposited, but to grain of a like quality and kind. In accordance with the general rule here laid down, such a transaction could not be anything else than a sale, certainly not a bailment to the warehouse man; and this is the ruling of some of the courts.<sup>3</sup> But there is a tendency of late to treat the transaction as the equivalent of a confusion of goods, and to make all the depositors of grain tenants in common of the whole bulk, while the warehouse man remains a bailee.<sup>4</sup> But this is a very severe strain on the

<sup>1</sup> *Schindler v. Westover*, 99 Ind. 395. See *Lyon v. Lenon*, 7 N. E. Rep. 311; *Ives v. Hartley*, 51 Ill. 520; *Benedict v. Ker*, 29 Up. Can. C. P. 410, 412; *Dean v. Lammers*, 63 Wis. 331, 336; *Bailey v. Bensley*, 87 Ill. 556, 560; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101, 107.

<sup>2</sup> See generally *Lonergan v. Stewart*, 55 Ill. 45; *Rahilly v. Wilson*, 3 Dill. 420; *Rankin v. Mitchell*, 1 Hannay N. B. 495; *Isaac v. Andrews*, 2 U. C. C. P. 40; *Nelson v. Brown*, 44 Iowa, 455; *Johnson v. Brown*, 37 Iowa, 200; *Sexton v. Graham*, 53 Iowa, 181; *Ledyard v. Hibbard*, 48 Mich. 421; *Hughes v. Stanley*, 45 Mich. 622; *Jones v. Kemp*, 49 Mich. 9; *Wilson v. Cooper*, 10 Iowa, 565; *Ives v. Hartley*, 51 Ill. 520; *Butterfield v. Lathrop* 71 Pa. St. 226; *Good v. Winslow*, 4 Allen N. B. 241.

<sup>3</sup> *Chase v. Washburn*, 1 Ohio St. 244 (59 Am. Dec. 623).

<sup>4</sup> See *Cushing v. Breed*, 14 Allen, 376; *German Nat. Bank v. Meadowcraft*, 4 Bradw. 630; *Arthur v. Chicago, etc., Ry. Co.*, 61 Iowa, 648; *Rice v. Nixon*, 78 Ind. 97; *Schindler v. Westover*, 99 Ind. 395; *Lyon v. Lenon*,

principle, where it is carried to the length of holding that the depositor of grain in an elevator is a tenant in common, not only with the other depositors who at that time have grain in the elevator or as long as some of his grain is still there,<sup>1</sup> but with every other person who might deposit grain in the elevator even after his grain had been taken away in filling some order. In this latter case, there never had been any confusion of goods, because the subsequent deposits were made when none of the grain of the depositor in question was left in the elevator. The only object of these later decisions seems to be to shield the elevator proprietors from responsibility in case of destruction or injury of the deposited grain.

§ 8. *Sale distinguished from consignment.*—A consignment of goods to a factor or commission merchant is a bailment and not a sale, although the object of the transaction is to sell the goods for the consignor, instead of returning them. But the same principle is at work as in the bailments, in which the identical things are to be returned, since by the terms of the contract, the goods never pass beyond the control of the consignor, except as to the consignee's lien for charges and advances, until the sales are made, when the price takes the place of the goods, and is held by the consignee subject to the consignor's orders. And whenever the consignment is revoked, the identical goods, so far as they have not been sold, are required to be returned. A consignment, therefore, is a bailment and not a sale, even though it is made under a *del credere* commission.<sup>2</sup> Nor does the transaction become a sale, if the

106 Ind. 567; *Broadwell v. Howard*, 77 Ill. 305; *Barker v. Bushnell*, 75 Ill. 220; *Sexton v. Graham*, 53 Iowa, 181.

<sup>1</sup> *Inglebright v. Hammond*, 19 Ohio, 337; *Dole v. Olmstead*, 36 Ill. 150; 41 Ill. 344; *Young v. Miles*, 20 Wis. 615; 23 Wis. 643.

<sup>2</sup> *Meldrum v. Snow*, 9 Pick. 441; *Audenried v. Betteley*, 8 Allen, 302; *Walker v. Buttrick*, 105 Mass. 237; *Ayers v. Sleeper*, 7 Met. 45; *Brown*

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goods have been invoiced to the consignee at a certain price,<sup>1</sup> unless the fixing of the price is intended to be a positive determination of the liability of the consignee, irrespective of the price obtained by him in the sale of the goods.<sup>2</sup> In the former case it is still a bailment, for the fixing of the price may serve only as the value of the goods, for the purpose of measuring damages in case of a failure to account for the goods, or for the purpose of indicating the minimum price for which the consignee may sell the goods. In the latter case, the consignee is evidently the primary debtor at all events, and hence he must have acquired title to the goods, which would make the transaction a sale. Whenever the result of the transaction is that the transferee is the primary debtor, even where the title to the goods does not pass out of the consignor until the sale, the sale of the goods by the consignee will necessitate a previous transfer to the consignee, and the consignment is thus changed into a sale.<sup>3</sup>

While the use of the word "consign" raises the presumption that the transaction is a consignment, it is not conclusive; for the context may indicate that the word was used in the place of "assign."<sup>4</sup>

§ 9. Sale distinguished from a lease or hiring. — A lease or hiring is only a temporary transfer, and hence is

*v. Holbrook*, 4 Gray, 102; *Weir Plow Co. v. Porter*, 82 Mo. 23; *Gooderham v. Marlett*, 14 U. C. Q. B. 228; *Bayliss v. Davis*, 47 Iowa, 840; *Williams v. Davis*, 47 Iowa, 363; *Boston & Maine R. R. Co. v. Warrior Mower Co.*, 76 Me. 251; *Blood v. Palmer*, 11 Me. 414; *Selden v. Beale*, 3 Greenl. 178; *Morse v. Stone*, 5 Barb. 516; *Conable v. Lynch*, 45 Iowa, 84; *Dodds v. Durand*, 5 U. C. Q. B. 623; *Alexander v. Tomlinson*, 40 Ark. 216, 218, 219.

<sup>1</sup> *Pam v. Vilmar*, 54 How. Pr. 235.

<sup>2</sup> *In re Linforth*, 4 Sawy. 374; *Jordan v. Easter*, 2 Ill. App. 73.

<sup>3</sup> *Mutter v. Wheeler*, 2 Low. 346; *Ex parte White*, L. R. 6 Ch. 397; *Towle v. White*, 21 Weekly Rep. 465.

<sup>4</sup> *Schenck v. Saunders*, 13 Gray, 37; *Ditman v. Norman*, 118 Mass. 319, 324; *Reissner v. Oxley*, 80 Ind. 580, 585.

a bailment. Where the transaction is an ordinary case of hiring, its real character is not hard to recognize.<sup>1</sup> But a transaction, which is substantially a sale, cannot be changed into a lease, merely by calling the periodical payments, *rent*, if on the last payment the thing is to become the property of the hirer. If, however, there is a *bona fide* hiring, with the privilege of purchase at a given price, over and above the periodical payments, then the transaction does not become a sale, until the additional sum is paid, or the hirer has notified the owner of his intention to buy.<sup>2</sup> Parol evidence is admissible to show the real character of the transaction, where it is at all involved in doubt.<sup>3</sup>

These questions have arisen lately on contracts for the disposition of organs, pianos, sewing machines, etc., under contracts which provide for the payment of periodical sums as rent, and the thing is to become the property of the other party on the payment of the last installment of rent. The courts have uniformly held these contracts to be sales, and not leases.<sup>4</sup> In some of the cases, the title is held to pass immediately.<sup>5</sup> But where the contract contains the express stipulation, as most of them do, that the title shall not pass until the last payment, the transaction is held to be a conditional sale, the condition being precedent.<sup>6</sup>

<sup>1</sup> See *Smith v. Niles*, 20 Vt. 315.

<sup>2</sup> *Forest v. Nelson*, 108 Pa. St. 481; *Stadtfield v. Huntsman*, 92 Pa. St. 53 (37 Am. Rep. 661, n. 664); *Brunswick and Balke Co. v. Hoover*, 95 Pa. St. 508 (49 Am. Rep. 674); *Edward's Appeal*, 105 Pa. St. 103.

<sup>3</sup> *Domestic Sewing Machine Co. v. Anderson*, 23 Minn. 57; *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa, 33.

<sup>4</sup> See *contra*, *Sumner v. Cottey*, 71 Mo. 121.

<sup>5</sup> *Greer v. Church*, 18 Bush, 480; *March v. Wright*, 46 Ill. 487; *Lucas v. Campbell* 88 Ill. 447 (31 Am. Rep. 81); *Singer Mfg. Co. v. Cole*, 4 Lea, 439 (40 Am. Rep. 21); *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Price v. McCallister*, 3 Grant Cas. 248.

<sup>6</sup> *Sargent v. Gile*, 8 N. H. 325; *Kohler v. Hayes*, 41 Cal. 456; *Singer Mfg. Co. v. Graham*, 8 Or. 17 (34 Am. Rep. 57); *Crist v. Kleber*, 79 Pa. St. 290; *Enlow v. Klein*, 79 Pa. St. 488; *Goodell v. Farebrother*, 12 R. I. 238; *Carpenter v. Scott*, 18 R. I. 474; *Hine v. Roberts*, 48 Conn. 267;



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The matter of conditional sales is more fully discussed elsewhere.<sup>1</sup>

§ 10. **Sale distinguished from mortgage.** — A mortgage is a conditional sale, made to secure the payment of a debt, with the condition that the sale shall, on payment of the debt, become void and the title revert to the vendor or mortgager. The title passes immediately subject to a reverter.<sup>2</sup>

§ 11. **Sale distinguished from gift.** — The sale is required to be supported by a valuable consideration. Hence a transfer of personal property for the sake of love and affection, or charity, is not a sale but a gift.<sup>3</sup> But this similarity is to be observed, that, like a sale, a gift is only complete and effectual when there has been a delivery. Without delivery, the transaction is an executory contract, and being without a valuable consideration cannot be enforced.<sup>4</sup> But, in order that the transaction may be a sale, there need not be a direct payment of money or promise to pay to the transferrer of the goods. A gift whose acceptance imposes the burden of paying a sum of money to some one, is essentially a sale, at least so far as the sum of money is an adequate consideration.<sup>5</sup>

§ 12. **Sale distinguished from exchange and barter.** — But, as generally defined, a sale not only requires to be supported by a valuable consideration; but the consideration

*Loomis v. Bragg*, 50 Conn. 228; *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender Co. v. Marshall*, 57 Vt. 322; *Gibbons v. Luke*, 37 Hun, 577.

<sup>1</sup> See *post*, § 203.

<sup>2</sup> See *post*, §§ 221, 224, for a fuller discussion.

<sup>3</sup> *Commonwealth v. Packard*, 5 Gray, 101; *Gray v. Burton*, 55 N. Y. 68, 72; 2 *Schouler Personal Prop.*, §§ 56, 57.

<sup>4</sup> *Irons v. Smallpiece*, 2 B. & Ald. 551; *Champney v. Blanchard*, 39 N. Y. 116; *Showers v. Pilch*, 4 Exch. 478; *Power v. Cook*, 4 Ir. C. L. 247; *Wing v. Merchant*, 57 Me. 388; *Douglass v. Douglass*, 22 L. T. (N. S.) 127; *Tenbrook v. Brown*, 17 Ind. 410; *Chadsey v. Lewis*, 1 Gilm. 153, 155.

<sup>5</sup> See *Bouvier Law Dict.*, Tit. Sale.

must be a price in money. Although it has been sometimes held that the sale must be a *transfer for money*, and that every other transfer is an exchange or barter,<sup>1</sup> the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value, so that the one thing is received in payment of the price of the other. For example, a contract to deliver or exchange thirty bushels of corn at twenty-five cents per bushel, for ten bushels of wheat at seventy-five cents per bushel, would be a sale, for the price of the corn would be liquidated by the acceptance of the wheat.<sup>2</sup> But if one thing is delivered in consideration of the receipt of something else, not money, and there is no agreed value at which these things are to be exchanged, the transaction is not a sale, but an exchange. The criterion in these cases is whether there is a fixed price, as a determination of the value at which the things are to be exchanged. If there is such a fixed price, the transaction is a sale; but if there is not, the transaction is an exchange.<sup>3</sup>

But notwithstanding this distinction between sale and exchange, the two transactions are so much alike in other respects that they are governed by the same rules of law.<sup>4</sup> And it has been held in Massachusetts, and elsewhere, that an exchange of intoxicating liquor for goods or labor was

<sup>1</sup> See Benjamin on Sales, § 2.

<sup>2</sup> Forsyth v. Jervis, 1 Stark. 437; Porter v. Talcott, 1 Cow. 359; Clark v. Fairchild, 22 Wend. 576; Pickard v. McCormick, 11 Mich. 69; Herrick v. Carter, 56 Barb. 41; Way v. Wakefield, 7 Vt. 228; Gunter v. Lecky, 30 Ala. 591; Loomis v. Wainwright, 21 Vt. 520; Sheldon v. Cox, 3 Barn. & C. 420; Hands v. Burton, 9 East, 349.

<sup>3</sup> Harris v. Fowle, cited in 1 H. Bl. 287; Mitchell v. Gile, 12 N. H. 390; Vail v. Strong, 10 Vt. 465; Campbell v. Sewell, 1 Chitty Rep. 611; Slayton v. McDonald, 73 Me. 50; Gunter v. Lecky, 30 Ala. 596; Fuller v. Duren, 36 Ala. 73.

<sup>4</sup> Dowling v. McKenny, 124 Mass. 480; Redfield v. Legg, 38 N. Y. 212.

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within the statute prohibiting sales of liquor.<sup>1</sup> It is to be expected, therefore, that when one speaks in general of sales, exchanges or barter are also included.

§ 13. Sale distinguished from assignment. — The term “assignment” is one of generic signification, and includes every species of transfer. Usually, the term is applied to transfers, which have no special name, such as an assignment for the benefit of creditors. And it is also used to indicate transfers by means of some written instrument, as the assignment of a bill of lading or mortgage. But the term also includes sales, whether oral or written. Sales are only a species of assignment.<sup>2</sup>

<sup>1</sup> Commonwealth v. Clark, 14 Gray, 367; Mason v. Lothrop, 7 Gray, 355; Howard v. Harris, 8 Allen, 297; U. S. v. Wittig, 2 Low, 466. But see *contra*, Stevenson v. State, 65 Ind. 409. See also Massey v. State, 74 Ind. 368; Ex parte Beaty, 1 S. W. Rep. (Tex.) 451; Marmont v. State, 48 Ind. 21; State v. Mercer, 32 Iowa, 405; Rickart v. People, 79 Ill. 85.

<sup>2</sup> See Ball v. Chadwick, 46 Ill. 31; Cowles v. Ricketts, 1 Iowa, 582, 585; Chase v. Walters, 28 Iowa, 460; Hight v. Sackett, 34 N. Y. 451; 1 Abbott's Law Dict. 96; Ferrins v. Little, 1 Green, 248; Potter v. Holland, 4 Blatchf. 210; 1 Bacon's Abr. 329.

## CHAPTER II.

### PARTIES.

**SECTION 16.** Who may be parties to contract of sale.

17. Disability of infants — Liability for necessaries.
18. Infant's contracts voidable, not void.
19. Ratification of infant's contracts.
20. Disaffirmance of sale by infant.
21. Lunatics and imbeciles.
22. Effect of insanity when unknown to other party.
23. Lunatic's contract for necessaries.
24. Ratification of lunatic's contracts.
25. Contracts of drunken persons.
26. The disability of all persons under guardianship — Spend-thrifts.
27. Disability of coverture — Contracts of married women.
28. Effect of marriage on ante-nuptial contracts.
29. Exceptions to married women's contractual disability.
30. Contracts of married women with a separate estate.

§ 16: Who may be parties to contract of sale. — The general rule is that any person has the capacity to buy goods, and any one, who is owner of the goods, has the capacity to sell them. But the law, for various reasons, places certain persons under legal disability, and when they are so disabled, their contracts of sale and of purchase are either absolutely void, or voidable at the instance of the party under disability. These legal disabilities will be referred to in the subsequent sections.

§ 17. Disability of infants — Liability for necessaries. — Persons under a certain age are called minors or infants, and because of their immaturity of mind the law takes away from them the power to make contracts, except for necessaries. The age of majority in all of the

United States for males, and in most of the States for females, is twenty-one years, and this was the common-law rule in England. But in some of the States, the majority of females is placed by statute at eighteen.<sup>1</sup> An infant's contract for necessaries is binding upon him, so far that he may be compelled to pay for their value; but he is not bound for the contract price. His liability for necessaries is rather imposed by the law, than the result of his contract.<sup>2</sup> To the question, what are necessaries, it may be replied, that whatever in reason the infant needs for his maintenance, shelter, education and comfort, regard being had to his means and social standing, would be held by the law to be necessaries.<sup>3</sup> And where the infant's means are considerable, articles which are useful, but which are ordinarily considered to be luxuries, unnecessary to the comfort of a child, such as a watch, a horse, or a valet, etc., may, nevertheless, in special cases be treated as necessaries, for which the infant will be liable on a *quantum meruit*.<sup>4</sup>

But money, whether for pleasure or for business enter-

<sup>1</sup> 1 Parsons' Contracts, 294; Bishop on Contracts, § 893; Cogel v. Raph, 24 Minn. 194. See Dent v. Cock, 65 Ga. 400.

<sup>2</sup> Hyer v. Hyatt, 3 Cranch C. C. 276; Robinson v. Weeks, 56 Me. 102; Stone v. Dennison, 13 Pick. 1; Earle v. Reed, 10 Met. 387; Gay v. Ballou, 4 Wend. 493; Commonwealth v. Hantz, 2 Pa. 333; Hyman v. Cain, 3 Jones (N. C.), 111; Bonchell v. Clary, 3 Brev. 194; Morton v. Steward, 5 Bradw. 533.

<sup>3</sup> Burghart v. Angerstein, 6 C. & P. 690; Peters v. Fleming, 6 M. & W. 42; Ryder v. Wombwell, L. R. 4 Ex. 32; Angel v. McLellan, 16 Mass. 28; Hoyt v. Casey, 114 Mass. 397; Strong v. Foote, 42 Conn. 203; Walling v. Toll, 9 Johns. 141; Gay v. Ballou, 4 Wend. 403; Werner's Appeal, 10 Norris (Pa.), 222; Anderson v. Smith, 33 Md. 465.

<sup>4</sup> "From the earliest time down to the present, the word 'necessaries' was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station and degree in life in which he is." Parke, B., in Pertes v. Fleming, 6 M. & W. 46; Berolles v. Ramsay, Holt N. P. 77; Hart v. Prater, 1 Jur. 623; Hands v. Slaney, 8 T. R. 578; Brooker v. Scott, 11 M. & W. 67; Merriam v. Cunningham, 11 Cush. 40; Davis v. Caldwell, 12 Cush. 512.

prises, is never a necessary, and therefore one who lends money to an infant cannot recover it as a necessary even though the money be afterwards spent for the necessaries.<sup>1</sup> So, also, will goods, furnished to an infant to carry on some mercantile or other business, not be considered necessaries, whose value can be recovered of the infant.<sup>2</sup> But where the infant is in charge of his property, under the law, it is generally held that he is so far relieved of his disability as to be able to contract for whatever is needed in the care and management of his property. Ordinarily the guardian would be authorized to make such contracts in his behalf.<sup>3</sup> But in no case can a tradesman recover of an infant for necessaries, when the infant is already supplied with them from some other source; the tradesman always acts at his peril in such cases, if he fails to make inquiries after the condition of the infant.<sup>4</sup>

§ 18. *Infant's contracts voidable, not void.* — Since the disability is imposed upon the infant for his own benefit and

<sup>1</sup> *Darbe v. Boucher*, 1 Salk. 279; *Earle v. Peal*, 1 Salk. 386; *s. c.* 10 Mod. 67; *Randall v. Sweet*, 1 Denio, 460; *Price v. Sanders*, 60 Ind. 310. But if the infant requests a third person to pay for the necessaries he has already bought, or is about to buy, he is obliged to repay the money so expended. *Clark v. Leslie*, 5 Esp. 23; *Swift v. Bennett*, 10 Cush. 436; *Conn v. Coburn*, 7 N. H. 368; *Smith v. Oliphant*, 2 Sandf. 306; *Haine v. Torrant*, 2 Hill (S. C.), 400.

<sup>2</sup> *Warwick v. Bruce*, 2 M. & S. 205; *Whywall v. Champion*, 2 Stra. 1083; *Dilk v. Keighley*, 2 Esp. 480; *Mason v. Wright*, 13 Met. 306; *Smith v. Kelley*, 13 Met. 309; *Lowe v. Griffith*, 1 Scott, 458; *Decell v. Lewenthal*, 57 Miss. 331.

<sup>3</sup> *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408; *Rundell v. Keeler*, 7 Watts, 237; *Watson v. Hensel*, 7 Watts, 344; *Tupper v. Caldwell*, 12 Met. 559; *Price v. Sanders*, 60 Ind. 310; *Mathes v. Dobschuetz*, 72 Ill. 438; *Dillon v. Bowles*, 77 Mo. 603; *Epperson v. Nugent*, 57 Miss. 45; *Chapman v. Hughes*, 61 Miss. 339; *Huff v. Bournell*, 48 Ga. 338.

<sup>4</sup> *Barnes v. Toye*, 13 Q. B. D. 410; *Story v. Pery*, 4 C. & P. 526; *Cook v. Deaton*, 3 C. & P. 114; *Hoyt v. Casey*, 114 Mass. 397; *Johnson v. Lines*, 6 Watts & S. 80; *Kraker v. Byrum*, 13 Rich. 163; *Nicholson v. Wilborn*, 13 Ga. 467; *Nichol v. Steger*, 6 Lea, 393.

protection, and not in pursuance of any public policy, his contracts of any kind, whether they be under seal or parol, with the exception of those for necessaries, just explained, are not absolutely void, but only voidable at his election, and may be enforced against the adult party.<sup>1</sup> It has been held that when a contract is clearly prejudicial to the interests of the infant, it is absolutely void.<sup>2</sup> But the authorities are not unanimous, many holding that all the infant's contracts are voidable only,<sup>3</sup> and perhaps the only foundation for the doctrine that the infant's contracts may be held to be void, when clearly prejudicial to him, is that the courts will during infancy avoid the contract, and secure a restitution of the property parted with under the contract, whenever such intervention is absolutely necessary for the infant's protection.

It is generally held that an infant's power of attorney

<sup>1</sup> *Bruce v. Warwick*, 6 Taunt. 118; *Warwick v. Bruce*, 2 M. & S. 205; *Holt v. Clarencieux*, 2 Stra. 937; *Nightingale v. Withington*, 15 Mass. 272; *Thompson v. Hamilton*, 12 Pick. 425; *Irvine v. Irvine*, 9 Wall. 617; *Baker v. Lovett*, 6 Mass. 73; *Edgerton v. Wolf*, 6 Gray, 453; *Judkins v. Walker*, 17 Me. 38; *Thomas v. Dike*, 11 Vt. 273; *Hoxie v. Lincoln*, 25 Vt. 206; *Kendall v. Lawrence*, 22 Pick. 540; *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 Cow. 22; *Bool v. Mix*, 17 Wend. 119; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Allen v. Poole*, 54 Miss. 323; *Haynes v. Slack*, 32 Miss. 193; *Bingham v. Barley*, 55 Tex. 281; *Chapman v. Chapman*, 13 Ind. 896; *Harrod v. Myers*, 21 Ark. 592; *Ferguson v. Bell*, 17 Mo. 347; *Lowe v. Sinklear*, 27 Mo. 308; *West v. Penny*, 16 Ala. 186; *Eureka Co. v. Edwards*, 71 Ala. 243; *Francis v. Felmit*, 4 Dev. & Bat. 498; *Mustard v. Wohlford*, 15 Gratt. 329; *Jenkins v. Jenkins*, 12 Iowa, 195.

<sup>2</sup> *Lumsden's Case*, 4 Ch. Ap. 31; *Robinson v. Weeks*, 56 Me. 102; *Oliver v. Houdlet*, 13 Mass. 237; *Owen v. Long*, 112 Mass. 403; *Swafford v. Ferguson*, 3 Lea, 292; *French v. McAndrew*, 61 Miss. 187; *Reg. v. Lord*, 12 Q. B. 757; *Fisher v. Mowbray*, 8 East, 330.

<sup>3</sup> *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Fetrow v. Wideman*, 40 Ind. 148; *Flexner v. Dickerson*, 72 Ala. 318. It has been held that an infant's contract of suretyship is absolutely void, because it cannot possibly be beneficial to him. *Maples v. Wrightman*, 4 Conn. 376. But it has been decided differently in the other courts. *Owen v. Long*, 112 Mass. 403; *Williams v. Harrison*, 11 S. C. 412; *Harner v. Dipple*, 31 Ohio St. 73; *Fetrow v. Wideman*, 40 Ind. 148.

under seal is absolutely void.<sup>1</sup> And there are some authorities which deny that the infant can appoint an agent for any purpose, all his acts by his agent being not merely voidable, but absolutely void.<sup>2</sup> But, perhaps, the weight of authority is in favor of conceding to the infant the same measure of power to act by an agent, as by himself, his powers of attorney being held to be voidable only and not void. And this doctrine has been frequently applied to the signing of promissory notes and other commercial paper.<sup>3</sup>

§ 19. **Ratification of infant's contracts.** — The contract made by an infant, being voidable, may be ratified by him and become a binding contract when he becomes of age. After ratification, the contract will be as valid a contract, and of the same legal character, as if it had been originally executed by an adult, and inures to the benefit of every subsequent holder.<sup>4</sup> It has been held that a ratification will not validate a contract and rebut the defense of infancy in an action on the contract, unless it is made before the action was brought;<sup>5</sup> but this view has been severely criticised, and it is believed that in this country a ratification will remove the defect whenever it is made.<sup>6</sup>

<sup>1</sup> *Poof v. Stafford*, 7 Cow. 179; *Waples v. Hastings*, 3 Harr. 403; *Wambole v. Foote*, 2 Dak. 1.

<sup>2</sup> *Thomas v. Roberts*, 16 M. & W. 778; *Robbins v. Mount*, 4 Rob. (N. Y.) 553; *Armitage v. Wildoe*, 36 Mich. 124; *Tapley v. McGee*, 6 Ind. 56; *Trueblood v. Trueblood*, 8 Ind. 195; *Flexner v. Dickerson*, 72 Ala. 318.

<sup>3</sup> *Whitney v. Dutch*, 14 Mass. 457; *Towle v. Dresser*, 73 Me. 252; *Pottinger v. Steuart*, 3 Harr. & J. 347; *Hall v. Jones*, 21 Md. 439; *Belton v. Briggs*, 4 Des. 465; *Alsworth v. Cordiz*, 31 Miss. 32; *Ward v. The Little Red*, 8 Mo. 353; *Hastings v. Dollarhide*, 24 Cal. 195.

<sup>4</sup> *Hunt v. Massey*, 5 Barn. & Ad. 902; *Lawson v. Lovejoy*, 8 Greenl. 405; *Reed v. Batchelder*, 1 Met. 559; *Goodsell v. Myers*, 3 Wend. 479; *Edgerly v. Shaw*, 5 Foster (N. H.), 514; *Cheshire v. Barrett*, 4 McCord, 241; *Little v. Duncan*, 9 Rich. 55; *West v. Penny*, 16 Ala. 186; *King v. Jamison*, 66 Mo. 498.

<sup>5</sup> *Thornton v. Illingworth*, 2 Barn. & C. 824.

<sup>6</sup> *Parsons' N. B. 72*. But see *Ford v. Phillips*, 1 Pick. 202; *Thing v. Libby*, 16 Me. 55; *Merriam v. Wilkins*, 6 N. H. 432.



It may be generally stated that no mere acknowledgment of the contract will amount to a ratification of an executory contract,<sup>1</sup> nor would part payment,<sup>2</sup> nor a submission to arbitration, unless the award has been rendered.<sup>3</sup> Nothing short of a new promise to pay amounts to a ratification. But there need not be any formal promise. Any words expressing or implying a promise will suffice.<sup>4</sup>

It is also held that, while mere acquiescence in the sale will not work a ratification,<sup>5</sup> if the infant retains and enjoys the use of the thing for an unreasonable time or sells it after reaching majority he will be held to have ratified the purchase.<sup>6</sup> But this is not a universal rule, there being cases in which it is held that a mere length of user will not amount to a ratification.<sup>7</sup>

No new consideration is needed,<sup>8</sup> but where the promise

<sup>1</sup> *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. 202; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Hale v. Gerrish*, 8 N. H. 374; *Wilcox v. Roath*, 12 Conn. 550; *Dunlap v. Hale*, 2 Jones (N. C.), 381; *Armfield v. Tate*, 7 Ire. 258; *Conklin v. Ogborn*, 7 Ind. 553; *Alexander v. Hutcheson*, 2 Hawks, 535; *Reed v. Boshears*, 4 Sneed, 118; *Thrupp v. Fielder*, 2 Esp. 628; *Benham v. Bishop*, 9 Conn. 330; *Whitney v. Dutch*, 14 Mass. 460.

<sup>2</sup> *Smith v. Mayo*, 9 Mass. 62; *Robbins v. Eaton*, 10 N. H. 561; *Catlin v. Haddox*, 49 Conn. 492; *Hinely v. Margaritz*, 3 Barr. 428.

<sup>3</sup> *Benham v. Bishop*, 9 Conn. 330; *Barnaby v. Barnaby*, 1 Pick. 221.

<sup>4</sup> *Hartley v. Wharton*, 11 Ad. & El. 93; *Bobs v. Hansley*, 2 Bailey, 114; *Whitney v. Dutch*, 14 Mass. 460; *Wright v. Steele*, 2 N. H. 51; *Owis v. Kimball*, 3 N. H. 314; *Martin v. Mayo*, 10 Mass. 137.

<sup>5</sup> *Boody v. McKenny*, 23 Me. 517, 525.

<sup>6</sup> *Boyden v. Boyden*, 9 Met. 519; *Eubanks v. Peat*, 2 Bailey, 497; *Lawson v. Lovejoy*, 18 Greenl. 405; *Cheshire v. Barrett*, 4 McCord, 241; *Alexander v. Heriot*, 1 Bailey Eq. 223; *Aldrich v. Grimes*, 10 N. H. 194; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Robinson v. Hoskins*, 14 Bush, 393; *Boody v. McKenny*, 23 Me. 517; *Deason v. Boyd*, 1 Dana, 45; But see *Henry v. Root*, 33 N. Y. 526; *Tarr v. Sumner*, 12 Vt. 28.

<sup>7</sup> *Whitcomb v. Joslyn*, 51 Vt. 79 (31 Am. Rep. 678).

<sup>8</sup> *Smith v. Kelly*, 13 Met. 309; *Owis v. Kimball*, 3 N. H. 314; *Holt v. Underhill*, 10 N. H. 220; *Goodsell v. Myers*, 3 Wend. 479; *Gay v. Ballou*, 4 Wend. 419; *Millard v. Hewlett*, 19 Wend. 301; *Turner v. Gaither*, 83 N. C. 357.

to pay is coupled with a condition, the condition must be performed before the ratification is complete.<sup>1</sup> In England and some of the States a written ratification is required by statute,<sup>2</sup> but in the absence of a statute, the ratification need not be in writing; it may be, and usually is, by parol, and of the most informal character.<sup>3</sup>

And ignorance of his right to disaffirm will not alter the binding effect of his ratification. *Ignorantia legis non excusat.*<sup>4</sup>

§ 20. **Disaffirmance of sale by infant.** — Where an infant has made a sale of goods, it has always been a matter of doubt, whether he would have to restore the property or other thing of value which he has received in consideration of the sale, before he could rescind the sale. It is held in some of the cases that if he has still the possession of the consideration, or it is within his control, he is obliged to tender it to the buyer before he can rescind the sale; otherwise not.<sup>5</sup> But there are many cases in which the question is not definitely settled, but in which it appears to be held that the consideration must be returned in any case. Certainly the general rule is, that the consideration must be returned, before the sale can be rescinded.<sup>6</sup> The

<sup>1</sup> *Cole v. Saxby*, 3 Esp. 159; *Davies v. Smith*, 4 Esp. 36; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Everson v. Carpenter*, 17 Wend. 419; *Chandler v. Glover*, 32 Pa. St. 509.

<sup>2</sup> *Thurlow v. Gilmore*, 40 Mo. 378; *Stern v. Freeman*, 4 Met. (Ky.) 309.

<sup>3</sup> *Martin v. Mayo*, 10 Mass. 137; *West v. Penny*, 16 Ala. 186; *Reed v. Boshears*, 4 Sneed, 118.

<sup>4</sup> *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Loward*, 40 Ohio St. 325; *Ring v. Jamison*, 2 Mo. App. 584; *s. c.* 66 Mo. 424; *Taft v. Sergeant*, 18 Barb. 320.

<sup>5</sup> *Eureka Co. v. Edwards*, 71 Ala. 248 (46 Am. Rep. 314); *Heath v. Stevens*, 48 N. H. 251; *Hall v. Butterfield*, 59 N. H. 354 (47 Am. Rep. 209); *Bartlett v. Bailey*, 59 N. H. 408.

<sup>6</sup> *Carr v. Clough*, 26 N. H. 280 (59 Am. Dec. 345, 349); *Farr v. Sumner*, 12 Vt. 28 (36 Am. Dec. 327); *Taft v. Pike*, 14 Vt. 405; *Price v. Farman*,

sale may be disaffirmed during minority, as well as after majority.<sup>1</sup>

§ 21. Lunatics and imbeciles. — According to the early English law, a man was not allowed to stultify himself by alleging his own lunacy or idiocy in defense of an action on his contract.<sup>2</sup> But this rule of the common law has been everywhere repudiated,<sup>3</sup> and the contract of a person, suffering from any form of dementia, is ordinarily held to be voidable.<sup>4</sup> If the lunatic has, by an inquisition of lunacy, been placed in charge of a committee or guardian, the judgment of lunacy is by many of the authorities held to be conclusive upon all parties, and that the contracts of such a lunatic are void, and not voidable.<sup>5</sup> But other authori-

27 Vt. 268; *Manning v. Johnson*, 26 Ala. 446; *Bingham v. Bailey*, 55 Tex. 381 (40 Am. Rep. 801); *Badger v. Phinney*, 15 Mass. 359; *Kitchen v. Lee*, 11 Paige, 107.

<sup>1</sup> *Shipman v. Horton*, 17 Conn. 481; *Stafford v. Root*, 9 Cow. 626; *Chapin v. Shafer*, 49 N. Y. 407; *Myers v. Saunders*, 7 Dana, 506; *Carr v. Clough*, 26 N. H. 280; *Towle v. Dresser*, 73 Me. 252; *Boal v. Mix*, 17 Wend. 119.

<sup>2</sup> *Beverley's Case*, 4 Rep. 126; *Stroud v. Marshall*, Cro. Eliz. 398; 1 *Parsons on Contracts*, 383.

<sup>3</sup> *Thornton v. Appleton*, 29 Me. 298; *Mitchell v. Kingman*, 5 Pick. 431; *Seaver v. Phelps*, 11 Pick. 304; *Grant v. Thompson*, 4 Conn. 203; *Lang v. Whidden*, 2 N. H. 435; *Rice v. Pelt*, 15 Johns. 503; *Bensell v. Chancellor*, 5 Whart. 371; *Turner v. Rusk*, 53 Md. 65; *Ballew v. Clark*, 2 Ire. 23; *Folson v. Garner*, 15 Mo. 494; *Webster v. Woodford*, 3 Day, 90.

<sup>4</sup> *Arnold v. Richmond, Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279; *Allis v. Billings*, 6 Met. 415; *Jackson v. Gumaer*, 2 Cow. 552; *Moore v. Hershey*, 9 Norris (Pa.), 196; *Turner v. Rusk*, 53 Md. 65; *McClain v. Davis*, 77 Ind. 419; *N. W. Mut. Ins. Co. v. Blankenship*, 94 Ind. 535; *Elston v. Jasper*, 45 Tex. 409; *Campbell v. Kuhn*, 45 Mich. 531; *Allen v. Berryhill*, 27 Iowa, 534; *Halley v. Troester*, 72 Mo. 73.

<sup>5</sup> *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Mohr v. Tulip*, 40 Wis. 66; *Griswold v. Butler*, 3 Conn. 227; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sharpsteen*, 4 Seld. 388; *Imhoff v. Whitmer*, 7 Casey (Pa.), 243; *Elston v. Jasper*, 45 Tex. 409. See *Van Deusen v. Sweet*, 51 N. Y. 378; *Allen v. Allen*, 9 Fost. (N. H.) 106; *Edwards v. Davenport*, 20 Fed. Rep. 756; s. c. 4 *McCrary*, 84.

ties, declare the judgment of lunacy to be only *prima facie* evidence of lunacy, except as to those who were parties to the inquisition, and hold the contracts of one, who has been thus declared a lunatic, to be only voidable.<sup>1</sup>

Mere weakness of mind, or want of business capacity, will not constitute such a dementia, as will in the absence of fraud affect the validity of a contract.<sup>2</sup> Nor will every monomania,<sup>3</sup> nor even every general insanity,<sup>4</sup> necessarily affect the capacity of a person to enter into a lawful contract.<sup>5</sup> In order that insanity may constitute a good defense to an action on a contract, the derangement of the mind must be of such a character, and so great, as that the person so afflicted is unable to comprehend the subject of the contract or appreciate its nature and probable consequences.<sup>6</sup> But where the monomania affects his understanding of the business transaction, the fact that he is otherwise of sound

<sup>1</sup> Little v. Little, 18 Gray, 264; Hart v. Deamer, 6 Wend. 497; Jacobs v. Richards, 18 Beav. 800; Yanger v. Skinner, 1 McCart. 389; Parker v. Davis, 8 Jones (N. C.), 460; Hopson v. Boyd, 6 B. Mon. 296.

<sup>2</sup> Farnum v. Brooks, 9 Pick. 212; Osmond v. Fitzroy, 8 P. Wms. 129; Stewart v. Lispenard, 26 Wend. 299; Lawrence v. Willis, 75 N. C. 471; Lewis v. Pead, 1 Ves. jr. 19.

<sup>3</sup> Burges v. Pollock, 53 Iowa, 273; West v. Russell, 48 Mich. 74; Boyce v. Smith, 9 Gratt. 704; Lozeau v. Shields, 8 C. E. Green, 509.

<sup>4</sup> Searl v. Galbraith, 73 Ill. 269.

<sup>5</sup> It follows that those who are merely deaf and dumb, deaf-mutes, are not incapacitated on account of these physical disabilities, if they are provided with some other means of manifesting their assent. Brown v. Brown, 8 Conn. 299; Brower v. Fisher, 4 Johns. Ch. 441; Barnett v. Barnett, 1 Jones Eq. 221; Christmas v. Mitchell, 5 Ire. Eq. 535.

<sup>6</sup> Hovey v. Hobson, 55 Me. 256; Hovey v. Chase, 52 Me. 304; Simes v. Skinner, 16 Mass. 348; Farnam v. Brooks, 9 Pick. 212; Bond v. Bond, 7 Allen, 1; Brown v. Brown, 108 Mass. 386; Dennett v. Dennett, 44 N. H. 431; Odell v. Buck, 21 Wend. 142; Lozeau v. Shields, 8 C. E. Green, 509; Smith v. Beatty, 2 Ired. Eq. 456; Hill v. Day, 7 Stew. Ch. 150; Stenon v. Wilson, 8 Edw. Ch. 36; Edwards v. Davenport, 20 Fed. Rep. 756; s. c. 4 McCrary, 84; Smith v. Elliott, 1 Pat. & H. 307; Musselman v. Cravens, 47 Ind. 1; Miller v. Craig, 36 Ill. 109; Henderson v. McGregor, 30 Wis. 78; Speers v. Sewell, 4 Bush, 289.

mind will not prevent the avoidance of the contract on the ground of insanity.<sup>1</sup>

§ 22. **Effect of insanity, when unknown to other party.**—It has been very curiously and anomalously held, in many cases, both in England and in this country, that where the party, dealing with the lunatic, is ignorant of his insanity, does not take advantage of him, acts in good faith in every respect, and there was nothing in the actions of the insane person to arouse the suspicions of any reasonably observant person, the contract cannot be avoided by the lunatic.<sup>2</sup>

But it is certainly an anomalous doctrine that the lunatic is bound by his contract, if the other contracting party was ignorant of his lunacy. Since his capacity depends upon his own mental condition, and the law, declaring the lunatic to be incapable of making a binding contract, is enacted for his protection against his own acts, it is difficult to see on what principle his liability can be made to depend upon the ignorance or knowledge of the other party. It would seem to be a better rule that a lunatic's contract is voidable, whether the other party is ignorant of, or acquainted with his mental condition, and such has been held to be the proper rule in the cases cited below.<sup>3</sup>

<sup>1</sup> *Riggs v. Am. Tract Soc.*, 95 N. Y. 503.

<sup>2</sup> *Paxon, J.*, in *Moore v. Hershey*, 90 Pa. St. 196. See, also, to same general effect, that lunacy is no defense, where it is unknown. *Molton v. Cameron*, 4 Exch. 17; *Elliott v. Ince*, 7 DeG. M. & G. 478; *Dane v. Kirkall*, 8 C. & P. 670; *Brown v. Todrell*, 8 C. & P. 30; *Loomis v. Spencer*, 2 Paige, 153; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Matthieson v. McMahan*, 88 N. J. 536; *Beals v. Shee*, 10 Pa. St. 56; *Lancaster Co. Bk. v. Moore*, 78 Pa. St. 407; *Wilder v. Weakley*, 34 Ind. 181; *Behrens v. McKenzie*, 23 Iowa, 333; *N. W. Mut. Ins. Co. v. Blankenship*, 94 Ind. 535; *Copenrath v. Kienby*, 83 Ind. 18; *Riggan v. Green*, 80 N. C. 236.

<sup>3</sup> *Sentance v. Poole*, 8 C. & P. 1; *Seaver v. Phelps*, 11 Pick. 304; *Hovey v. Hobson*, 53 Me. 451; *Rogers v. Blackwell*, 49 Mich. 192; *Van Patton v. Beals*, 46 Iowa, 63; *Edwards v. Davenport*, 20 Fed. Rep. 756; *s. c.* 4 McCrary, 34.

§ 23. **Lunatic's contracts for necessaries.**— Like the infant, the lunatic has the power to contract for necessaries, not only for himself, but also for his dependent family; or, rather, the law permits whoever furnishes the lunatic and his family with necessaries to recover their value; and the lunatic's contract for necessaries, will be enforceable to the extent of their actual value.<sup>1</sup> As in the case of infants, what are to be included in necessaries can only be determined by a consideration of what is fitting for one having the means and social standing of the lunatic.<sup>2</sup>

§ 24. **Ratification of lunatic's contracts.**— Since the contracts of the insane person are only voidable, not void, they may be ratified or disaffirmed by the lunatic, either during a lucid interval or whenever he is permanently restored to sanity.<sup>3</sup> Or they may be ratified or disaffirmed by the committee or guardian, during his insanity,<sup>4</sup> or in the event of his death by his personal representatives.<sup>5</sup>

§ 25. **The contracts of drunken persons.**— Drunkenness is, in legal contemplation, an aberration of mind, sim-

<sup>1</sup> *Stedman v. Hart*, 1 Kay, 607; *Baxter v. Portsmouth*, 5 B. & C. 170 (2 C. & P. 178); *In re Weaver*, 21 Ch. D. 615; *Read v. Legard*, 6 Exch. 636; *Davidson v. Wood*, 1 De G. J. & S. 465; *McCullis v. Bartlett*, 8 N. H. 569; *La Rue v. Gilkyson*, 4 Pa. St. 375; *Richardson v. Strong*, 13 Ired. 106; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Fitzgerald v. Reed*, 9 Smed. & M. 94; *McCormick v. Littler*, 85 Ill. 62; *Darby v. Cabanne*, 1 Mo. App. 126; *Van Patton v. Marks*, 46 Iowa, 68.

<sup>2</sup> *Baxter v. Portsmouth*, 7 Dow. & Ry. 614 (2 C. & P. 178). In *Williams v. Wentworth*, 5 Beav. 325, a lunatic's contracts for the repair or preservation of his estate were held to be binding upon him. See *Surles v. Pipkin*, 69 N. C. 513.

<sup>3</sup> *Arnold v. Richmond Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279; *Allis v. Billings*, 6 Met. 415; *Turner v. Rusk*, 53 Md. 65; *N. W. Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535; *Elston v. Jasper*, 45 Tex. 409.

<sup>4</sup> *Moore v. Hershey*, 90 Pa. St. 196; *McClain v. Davis*, 77 Ind. 419; *Halley v. Froester*, 72 Mo. 73.

<sup>5</sup> *Campbell v. Kuhn*, 45 Mich. 513; *Schuff v. Ransom*, 79 Ind. 458.

ilar in its effect upon the reasoning faculties as temporary insanity. Hence we find that the legal effect of contracts, made by one in a state of intoxication, is affected in the same way by the intoxication of the contractor, as they are by his insanity. His contracts will not be invalidated by the fact that he was under the influence of intoxicating liquor when he made them, if he was not bereft of his reason.<sup>1</sup> The intoxication must be so great that the person cannot comprehend the nature of the business, or the character of the instrument he is signing.<sup>2</sup> Even an habitual drunkard's contracts are valid, if they are made when he is not so intoxicated that he cannot understand the business.<sup>3</sup> But where a disadvantageous contract is made with one whose mind has become enfeebled by habitual drunkenness, and the other party knew of his mental weakness, the courts will presume fraud, and avoid the contract, in the absence of counter proof of fair dealing.<sup>4</sup> It is not necessary that the drunkenness of the person be procured by the other contracting party, in order that the contract may for this reason be avoided.<sup>5</sup> But if it was

<sup>1</sup> *Caulkins v. Fry*, 85 Conn. 170; *Reinicker v. Smith*, 2 Harr. & J. 421; *Woods v. Pindal*, Wright (Ohio), 507; *Henry v. Ritenour*, 31 Ind. 186; *Belcher v. Belcher*, 10 Yerg. 121; *Morris v. Nixon*, 7 Humph. 579; *Cavender v. Waddingham*, 5 Mo. App. 457; *Reynolds v. Dechaums*, 24 Tex. 174; *Pickett v. Sutter*, 5 Cal. 412.

<sup>2</sup> *Pitt v. Smith*, 3 Camp. 33; *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *Gore v. Gibson*, 13 M. & W. 623; *Wigglesworth v. Steers*, 1 Hening & M. 154; *Clark v. Caldwell*, 6 Watts, 139; *Jenness v. Howard*, 6 Blackf. 240; *Dulaney v. Green*, 4 Harr. 285; *Drummond v. Hooper*, 4 Harr. 327; *Johns v. Fritchey*, 39 Md. 258; *Wilson v. Briggs*, 7 Watts & S. 111; *Berkley v. Cannon*, 4 Rich. 136; *Williams v. Inabnet*, 1 Bailey, 343; *Cummings v. Henry*, 10 Ind. 109; *Wyck v. Brasher*, 81 N. Y. 260; *Bates v. Ball*, 72 Ill. 108; *Schramm v. O'Connor*, 98 Ill. 539.

<sup>3</sup> *Ritter's Appeal*, 9 Smith (Pa.), 9; *Miller v. Finley*, 26 Mich. 249.

<sup>4</sup> *Holland v. Barnes*, 53 Ala. 83. In this case a note based on insufficient consideration was thus obtained from one who was partially intoxicated and enfeebled by habitual drinking.

<sup>5</sup> *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Freeman v. Staats*, 4 Halst. Ch. 814; *French v. French*, 8 Ohio, 214; *Donelson v. Posey*, 13 Ala. 752.

so procured, with the intention to take advantage of him, it would be a case of fraud, and the contract could be avoided, although the intoxication did not deprive him of his mental faculties completely.<sup>1</sup> Indeed, any undue advantage taken of a man's intoxication will avoid a contract which he would not have made if he was sober.<sup>2</sup>

§ 26. **The disability of all persons under guardianship — Spendthrifts.** — As in the case of infancy, lunacy, so may one be placed under guardianship for other causes which render him more or less unable to take care of himself; for example, the habitual drunkard and spendthrift. Any one who is for any cause placed under a guardian and deprived of the control of his property, is consequently deprived of the power to make a contract.<sup>3</sup>

§ 27. **Disability of coverture — Contracts of married women.** — At common law, the legal personality of the woman was completely merged in that of the husband, and with the loss of her legal personality she was also deprived of the control of her property and of her contractual powers.<sup>4</sup> Of late years, in this country, a tendency has been manifested generally to break away from these common-law rules of disability of coverture, and since the legislative powers of the different States are acting independently

<sup>1</sup> *Say v. Barwick*, 1 Ves. & B. 195; *Wilcox v. Jackson*, 51 Iowa, 208.

<sup>2</sup> *Burroughs v. Richman*, 1 Green (N. J.), 233; *Butler v. Mulvihill*, 1 Bligh, 137; *Birdsong v. Birdsong*, 2 Head, 289; *Murray v. Carlin*, 67 Ill. 286; *White v. Cox*, 2 Hayw. 79; *Mansfield v. Watson*, 2 Iowa, 111; *Henry v. Ritenour*, 31 Ind. 136.

<sup>3</sup> *Mansfield v. Felton*, 13 Pick. 206; *Chew v. Bank of Baltimore*, 14 Md. 299; *Lynch v. Dodge*, 130 Mass. 458. For the constitutional limitations upon the power of the State to deprive a spendthrift of the control of his property, and to place him under guardianship, see *Tiedeman's Limitations of Police Power*, § 138.

<sup>4</sup> For a consideration of the reasons that induced the subjection of the wife and her property to the control of the husband, see *Tiedeman's Limitations of Police Power*, §§ 161-163.



of each other and without concert, we naturally find the existing law of married women to vary in detail with each State, in almost all of which there is found a variable divergence from the common-law rules. In consequence of the general character of a treatise like the present, it will be impossible to state the statutory law of each State, and any attempt to make a general statement of the statutory modifications would be more or less misleading. It has consequently been deemed advisable not to make such an attempt, and confine the present statements to a consideration of the common-law rules, warning the reader to look for modifications in the statutes of the State in which the contracts of a married woman are made or are to be performed. According to the common law, a married woman cannot make a valid contract of sale, and her attempt to do so is absolutely void. So void are all her contracts that a ratification of them after she becomes sole does not bind her, unless the ratification is based upon a new consideration.<sup>1</sup> But it has been held that she might ratify purchases for her own benefit, especially necessities for herself and the ratification would be binding upon her.<sup>2</sup>

§ 28. **Effect of marriage on ante-nuptial contracts.** — If a woman, while single, makes a contract and marries before it is paid, the liability for its payment is imposed by the law upon the husband during the marriage. Although, in theory, this obligation of the husband for the ante-nuptial debts of his wife rests upon the supposition that he has come into possession of all her property, and hence the

<sup>1</sup> *Smith v. Allen*, 1 Lans. 101; *Watkins v. Halstead*, 2 Sandf. 311; *Hayward v. Barker*, 52 Vt. 439; *Kennelly v. Martin*, 8 Mo. 698; *Musick v. Dodson*, 74 Mo. 624; *Waters v. Bean*, 15 Ga. 358; *Porterfield v. Butler*, 47 Miss. 165.

<sup>2</sup> See *Goulding v. Davidson*, 28 Barb. 438; *s. c.* 26 N. Y. 604; *Vance v. Wells*, 8 Ala. 399; *Hubbard v. Bugbee*, 55 Vt. 506. See also *Hemp-hill v. McClimans*, 24 Pa. St. 367.

creditors cannot secure payment from her, yet his liability for these debts is not limited to the amount of property he has acquired from his wife; nor does it depend upon his knowledge of their existence at the time of the marriage. He is liable, even if she comes to him without any dowry, and laden with debts, whose existence has been concealed from him.<sup>1</sup> In all such cases the husband and wife must be sued jointly.<sup>2</sup> But the liability of the husband, and of his property, for the ante-nuptial contracts of his wife expires with the termination of the coverture, whether it closes with the death of either of them or by divorce. If the husband dies before action is instituted, his surviving wife will alone be liable and not his estate; and in the event of her death, during the lifetime of the husband, action must be brought against her personal representatives.<sup>3</sup> And all her property, remaining at her death, including her *choses in action*, not reduced to possession by the husband, will be liable in the hands of her administrator for these debts.<sup>4</sup>

§ 29. **Exceptions to married women's contractual disability.**— There are several exceptional cases, in which the married woman is given by the law the power to contract. The first case is where the husband is an alien or civilly dead. If the husband is an alien enemy, he is prevented by law from coming to her aid; it is therefore necessary for her own maintenance and support to have the power to contract, and the law concedes this power to her. So, also, where the husband is simply an alien, and has never resided in this country, particularly when he is prohibited by the laws

<sup>1</sup> 1 Blackst. Com. 443; 2 Kent Com. 143-146; Schouler's Domestic Relations, 69; 1 Daniel's Negot. Inst., § 258.

<sup>2</sup> Mitchinson v. Hewson, 7 T. R. 348.

<sup>3</sup> Woodman v. Chapman, 1 Camp. 189; Curtton v. Moore, 2 Jones' Eq. 204; 2 Kent Com. 144; Byles on Bills, (\*66), 110.

<sup>4</sup> Heard v. Stamford, 3 P. Wms. 409; Morrow v. Whitesides, 10 B. Mon. 411; 1 Parsons' N. & B. 86.

of his own country from leaving the realm without the permission of the State authority.<sup>1</sup> In Massachusetts it has been held that the States of the American Union are foreign States so far that a husband is treated as an alien who lives in a different State from that in which his wife resides. She has in such a case the same powers of a *feme sole*, which are conceded to her, when her husband lives and has always lived in a foreign land.<sup>2</sup> But if the alien has once lived in the same State or country with his wife, and has gone abroad, she does not acquire the rights of a *feme sole*, until, by a seven years' absence, and without communication or intelligence of him during that time, he is presumed by the law to be dead.<sup>3</sup> In Massachusetts, permanent desertion and departure of the husband to a foreign State, restore the powers of a single woman to the wife, and she can then make binding contracts.<sup>4</sup> But a contrary decision was reached in a similar case by the Supreme Court of Missouri. The court say: "Coverture operates [as] a legal disability to contract, and all contracts of a *feme covert* are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in these cases do not apply. If by a removal from one State to another, or a separate residence in different States, the indissoluble connection by which the wife is placed under the power and protection of her husband could be cancelled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of

<sup>1</sup> Derry v. Duchess of Mazarine, 1 Ld. Raym. 147; Kay v. Duchesse de Peinne, 3 Camp. 123; Gregory v. Paul, 15 Mass. 31; McArthur v. Bloom, 2 Duer, 151.

<sup>2</sup> Abbott v. Bailey, 6 Pick. 89.

<sup>3</sup> Kay v. Duchesse de Peinne, 3 Camp. 123; Loring v. Sleineman, 1 Met. 204.

<sup>4</sup> Gregory v. Paul, 15 Mass. 31.

troubling the legislature or the courts on the subject of divorces.”<sup>1</sup> The married woman is, for like reasons, not restored to the legal freedom of a single woman, when she is merely living apart from her husband; <sup>2</sup> or when she has been divorced from her husband *a mensa et thoro*.<sup>3</sup> But all absolute divorces, whether common-law or statutory, will remove from the married woman her marital disabilities, since these divorces operate as a complete dissolution of the marriage tie.<sup>4</sup> Imprisonment, banishment or transportation, or the renunciation of civil life by the entry into a monastery or convent, have been held to dissolve the marriage tie so far as to restore the married woman to the contractual and property rights of a single woman.<sup>5</sup> By the custom of London, a married woman was allowed to become a merchant on her own account, to be a *sole trader*, as she was called. As a sole trader, she had the incidental power to make all contracts necessary for the prosecution of her separate business.<sup>6</sup> In the United States, a similar power is sometimes granted by statute to make all sorts of contracts, in the capacity of a sole trader.<sup>7</sup> But in the absence of statutory authority, the married woman cannot become a trader, except by the consent of her husband; and, of course, his consent makes him a responsible party to the business.<sup>8</sup>

<sup>1</sup> *Chouteau v. Merry*, 8 Mo. 254.

<sup>2</sup> *Marshall v. Rutton*, 8 T. R. 545; *Hatchett v. Baddeley*, 2 W. Black. 1079; *Lean v. Schultz*, 2 W. Black. 1195; *Hyde v. Price*, 3 Ves. jr. 443.

<sup>3</sup> *Fairthorne v. Blaquire*, 6 Maule & S. 73; *Lewis v. Lee*, 8 Barn. & C. 291. The rule is different in Massachusetts. *Dean v. Richmond*, 5 Pick. 461.

<sup>4</sup> *Chamberlaine v. Hewson*, 5 Mod. 71; 1 *Daniel's Negot. Inst.*, § 243; *Story on Bills*, § 90; 1 *Parsons' N. & B.* 78.

<sup>5</sup> *Hatchett v. Baddeley*, 2 W. Blackst. 1079; *Ex parte Franks*, 7 Bing. 762; 2 *Kent Com.* 136.

<sup>6</sup> *Beard v. Webb*, 2 B. & P. 93; *Byles on Bills* (\*68), 105.

<sup>7</sup> *Camden v. Mullen*, 29 Cal. 566.

<sup>8</sup> *Richardson v. Merrill*, 32 Vt. 27; *Partridge v. Stocker*, 36 Vt. 108; *James v. Taylor*, 43 Barb. 530; *Todd v. Lee*, 16 Wis. 480; *Moses v.*

§ 30. **Contracts of married women with a separate estate.**—In order to relieve married women of the hardships that ordinarily result from her common-law disabilities, as soon as the conception of an equitable estate in property apart from the legal title was fully developed, the English Court of Chancery so constructed the equitable estate that it was held by its owner free from all the common-law restrictions and qualities, which hampered the enjoyment of the property, or which for some other reason were found to be burdensome. It thus became the rule of equity, that a married woman could hold and enjoy, separate from and beyond the control of the husband, any property that was settled on her as an equitable estate *to her sole and separate use*.<sup>1</sup> In making a conveyance to the separate use of a married woman, her power of alienation and disposition may, by a special clause, be restricted or taken away entirely during the marriage.<sup>2</sup> In the absence of such a restraining clause in England and in most of the United States, a married woman is to be treated, in respect to her separate property, as a *feme sole*, and she may dispose of the equitable estate as she pleases.<sup>3</sup> In a number of

Fogartie, 2 Hill (S. C.), 335; Abbott v. Mackinley, 2 Miles, 220. But it has been held in New York that if a husband authorizes his wife to execute notes, in order that the notes may be binding upon the husband, they must purport on their face to have been given by the wife, as agent or on behalf of the husband. Minard v. Mead, 7 Wend. 68.

<sup>1</sup> See Tiedeman on Real Property, § 469.

<sup>2</sup> Hawkes v. Hubback, L. R. 11 Eq. 5; In re Gaffee's Trusts, 1 Macn. & G. 541; Tullett v. Armstrong, 4 My. & Cr. 377; Waters v. Tazewell, 9 Md. 291; Fellows v. Taun, 9 Ala. 999; Shirley v. Shirley, 9 Paige, 363; Fears v. Brooks, 12 Ga. 195; Baggett v. Meux, 1 Phil. 627. But see Dubs v. Dubs, 31 Pa. St. 149; Miller v. Bingham, 1 Ired. 423.

<sup>3</sup> Fettiplace v. Gorges, 1 Ves. 46; Rich v. Cockerill, 9 Ves. 69; Wagstaff v. Smith, 9 Ves. 520; Sturgis v. Corp., 13 Ves. 190; Major v. Lansley, 2 Russ. & My. 357; Essex v. Atkins, 14 Ves. 542; Dyett v. North Am. Coal Co., 20 Wend. 570; s. c. 7 Paige Ch. 1; Powell v. Murray, 2 Edw. Ch. 636; Gardner v. Gardner, 32 Wend. 526; Yale v. Dederer, 18 N. Y. 269; Imlay v. Huntington, 20 Conn. 17b; Leaycraft v. Hedden, 3

the States, however, the English rule has been discarded and the contrary doctrine maintained, that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed of settlement.<sup>1</sup> Accordingly, we find that in England, as in those States in which the married woman has in respect to her separate estate the powers of a single woman, and in all other States when these powers are expressly reserved to her, all her contracts, which are made on the faith of the separate estate, can be enforced against it. In England, her separate estate is liable for all of her debts, for it is presumed that credit was given to her in any case on the faith of the liability of the separate estate.<sup>2</sup> And this is also the rule in many of the States, denying the necessity of any express charge of the debt on the estate, or even the appropriation of the consideration to the benefit of her estate.<sup>3</sup> But in New

Green Ch. 551; *Wyly v. Collins*, 9 Ga. 223; *Cooke v. Husbands*, 11 Md. 492; *Chew's Admr. v. Beall*, 13 Md. 348; *McCroan v. Pope*, 17 Ala. 612; *Collins v. Larenburg*, 19 Ala. 685; *Coleman v. Woolley*, 10 B. Mon. 320; *Hardy v. Van Harlinger*, 7 Ohio St. 208; *Whitesides v. Cannon*, 23 Mo. 457; *Segoud v. Garland*, 23 Mo. 547; *Frazier v. Brownlow*, 3 Ired. Eq. 237; *Newlin v. Freeman*, 4 Ired. 312.

<sup>1</sup> *Ewing v. Smith*, 3 Desa. 417; *Reed v. Lamar*, 1 Strobb. Eq. 27; *Calhoun v. Calhoun*, 2 Strobb. 231; *Magwood v. Johnson*, 1 Hill Ch. 228; *Lancaster v. Dolan*, 1 Rawle, 231; *Wallace v. Costan*, 9 Watts, 137; *Thomas v. Folwell*, 2 Whart. 11; *Patterson v. Robinson*, 1 Casey, 81; *Metcalf v. Cook*, 2 R. I. 355; *Williamson v. Beckham*, 8 Leigh, 20; *Morgan v. Elam*, 9 Yerg. 375; *Marshall v. Stephens*, 8 Humph. 159; *Doty v. Mitchell*, 9 Smed. & M. 447; *Montgomery v. Agricultural Bank*, 10 Smed. & M. 567.

<sup>2</sup> *Bulfin v. Clarke*, 17 Ves. 366; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Bingham v. Noyes*, Chitty on Bills, (21) 28; *Stewart v. Lord Kirkwall*, 3 Mad. Ch. 337.

<sup>3</sup> *Wicks v. Mitchell*, 9 Kan. 80; *Bell v. Kellar*, 15 B. Mon. 331; *Metropolitan Bk. v. Taylor*, 62 Mo. 338; *Morrison v. Thistle*, 67 Mo. 596; *Grapergether v. Fejervary*, 9 Iowa, 163; *Todd v. Lee*, 15 Wis. 365; *Major v. Symmes*, 19 Ind. 117; *Williams v. Urmston*, 35 Ohio St. 296 (overruling *Levi v. Earle*, 30 Ohio St. 147); *Pentz v. Simeon*, 2 Beasley, 232; *Rogers v. Ward*, 8 Allen, 337; *Garland v. Pamplin*, 32 Gratt. 303. In *Frank v. Lillienfeld*, 33 Gratt. 349, Burks, J., said: "It is necessary

York, it has been held that in order that a married woman's separate estate may be charged with her debts, the intention to so charge it must be declared in the contract of indebtedness itself; or it must be shown that the consideration of the debt was obtained for the benefit of the estate.<sup>1</sup> The charge upon the separate estate is a rule in equity, designed to offset the favor shown to married women, in violation of the common-law rule of disability. As it has been explained by an English chancellor,<sup>2</sup> "the separate property of a married woman, being a creature of equity, it follows that if she had a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied." There is, therefore, in such a case no personal liability for the debt.<sup>3</sup>

that it (the contract of the married woman) be entered into with reference to, and in the credit of, the separate estate. There must be an intention to make the separate estate liable. It need not, however, be express; it may be implied. It is implied when the wife executes a bond, note, or other instrument for the payment of money, either as principal or as surety for another, even for her husband, no undue influence being used."

<sup>1</sup> *Yale v. Dederer*, 22 N. Y. 450; *s. c.* 18 N. Y. 265 (overruling same case in 21 Barb. 286); *White v. McNett*, 33 N. Y. 371; *Ledlie v. Vrooman*, 41 Barb. 109; *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *Second Nat. Bk. v. Miller*, 60 N. Y. 639; *Conlin v. Cantrell*, 64 N. Y. 219. See, also, *Kenton Ins. Co. v. McClellan*, 43 Mich. 564; *Heugh v. Jones*, 32 Pa. St. 432. But the note of the married woman, given for money expressed to be applied to the separate estate, will be binding upon the estate, although she afterwards makes some other use of it. *McVey v. Cantrell*, 70 N. Y. 295. *Contra*, *Heugh v. Jones*, 32 Pa. St. 432.

<sup>2</sup> Lord Chancellor Cottenham in *Owens v. Dickenson*, 1 Craig & Ph. 48.

<sup>3</sup> *Lloyd v. Lee*, 1 Strange, 94; *Littlefield v. Shee*, 2 B. & Ad. 84; *Leer v. Muggridge*, 5 Taunt. 36.

But any separate property she might own at the time of trial and judgment will be liable,<sup>1</sup> unless the debt has been made a special charge upon a particular piece of property; when the right of recovery will be confined to that property, and the remainder of her separate estate will not be liable.<sup>2</sup>

<sup>1</sup> *Todd v. Ames*, 60 Barb. 462.

<sup>2</sup> See *Kimm v. Weippert*, 46 Mo. 532; *Wolf v. Van Metre*, 28 Iowa, 397.

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## CHAPTER III.

### ASSENT.

#### SECTION 33. General proposition.

34. Effect of variance from offer.
35. Mistakes of fact.
36. Counter-proposition works rejection of original offer—  
Effect of subsequent acceptance.
37. Conditional acceptance, when binding.
38. Acceptance must be communicated.
39. Communication by mail, telegraph, telephone, phonograph.
40. Right to retract offer.
41. When contract for option is binding.
42. Retraction of acceptance.
43. When assent not necessary.

§ 33. **General proposition.**—It is a universal rule of the law of contracts, as well as of the law of sales, that there is no binding contract, and hence no sale, unless the parties have mutually assented to the same contract. Until there is a clearly defined offer on the one hand and an acceptance on the other of the same offer, there cannot be a sale; and no title passes, even though the possession is transferred.<sup>1</sup>

Mere negotiations, which do not contain a distinct offer and acceptance, will not be considered a sale. For example, S. wrote G.: “How many rags have you on

<sup>1</sup> *Utley v. Donaldson*, 94 U. S. 29, 47; *Gardner v. Lane*, 12 Allen, 39, 48; *Summers v. Mills*, 21 Tex. 77, 86, 87; 2 Kent Com. 477; *Champion v. Short*, 1 Camp. 63; *Hutchinson v. Bowker*, 5 M. & W. 535; *Wontner v. Sharp*, 4 C. B. 404; *Chaplin v. Clarke*, 4 Ex. 403; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Proprietors Eng. & For. Cr. Co. v. Arduin*, L. R. 5 H. L. 64; *Crossley v. Maycock*, 18 Eq. 180; *Stanley v. Dowdeswell*, L. R. 10 C. P. 102; *Lewis v. Brass*, 3 Q. B. D. 667.

hand, and your price for them?" G. replied, "We have about a ton, and our price is 3½ cents." S., answered, "We will take the rags at the price you name." Held, to be no sale, because there was no distinct offer and acceptance.<sup>1</sup> It has also been held to be no sale, where the negotiations have not produced a clear statement of the contract, although there may be a mutual determination to make a sale.<sup>2</sup> But where all the terms of the sale have been agreed upon, and nothing further is to be done but to make a more formal expression of the contract of sale, there will be a present binding contract of sale, notwithstanding the parties contemplate the subsequent execution of a formal bill of sale.<sup>3</sup> The sale is also void, where the terms of the contract are ambiguous or unintelligible.<sup>4</sup>

§ 34. **Effect of variance from offer.** — If the acceptance varies from the offer in respect to the quantity, quality or identity of the thing sold, or as to the terms and conditions of the sale, there is no sale, and title does not pass. The acceptance would in such cases be in effect a counter-proposition, which would have to be accepted by the offerer, before it could become a complete sale.<sup>5</sup> Where, therefore,

<sup>1</sup> *Smith v. Gowdy*, 8 Allen, 566. See, to same effect, *Slymaker v. Irwin*, 4 Whart. 369; *Beaupre v. Pacific, &c., Tel. Co.*, 18 U. C. Q. B. 60; *Moulton v. Kershaw*, 59 Wis. 316. See, also, *Craig v. Harper*, 3 Cush. 158; *Tucker v. Woods*, 12 Johns. 190; *McDonald v. Bewick*, 51 Mich. 79; *Fenno v. Weston*, 31 Vt. 345; *Falls v. Gaither*, 9 Port. 605; *Johnston v. Fessler*, 7 Watts, 48; *Johnson v. Filkington*, 39 Wis. 62.

<sup>2</sup> *Appleby v. Johnson*, L. R. 9 C. P. 158.

<sup>3</sup> *Crossley v. Maycock*, 18 Eq. 130; *Lewis v. Brass*, 3 Q. B. D. 667 C. A.; *Bonnewell v. Jenkins*, 8 Ch. D. 70 C. A.; *Brogden v. Metropolitan Railway Co.*, 2 App. Cas. 672; *Rossiter v. Miller*, 3 App. Cas. 1124.

<sup>4</sup> *Whelan v. Sullivan*, 102 Mass. 204; *Cummer v. Butts*, 40 Mich. 322; *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313; *Guthing v. Lynn*, 2 B. & Ad. 232; *Pearce v. Watts*, 20 Eq. 492; *Bourne v. Seymour*, 16 C. B. 337; 24 L. J. C. P. 207.

<sup>5</sup> *Hutchinson v. Bowker*, 5 M. & W. 535; *Jordan v. Norton*, 4 M. & W. 155; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; 31 L. J. C. P. 204; *Watts*

an offer to buy a certain quantity of goods is partly filled by the shipment of a smaller quantity, there is no sale, and the loss of the property, while in transit, will fall on the shipper, and not on the consignee.<sup>1</sup> But if the smaller shipment is actually received, and retained by the party ordering the larger quantity, the law will imply a contract to buy the smaller quantity and the party so accepting it will be responsible for the contract price. This is certainly the rule, where the goods are received with the knowledge that the whole amount cannot or will not be furnished.<sup>2</sup> If the part of the goods is received without knowing that the whole amount would not be furnished the goods could be returned, if not consumed or disposed of. And, presumably, if consumed, the party consuming them, although not liable on any implied contract of sale, would be liable for a conversion of the goods to the amount of their market value, instead of the contract price. A similar liability attaches, where, in response to an order for a given quantity, a larger quantity is sent and a portion smaller than that which

*v. Ainsworth*, 1 H. & C. 83; 31 L. J. Ex. 448; *Proprietors English and Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64; *Carr v. Duval*, 14 Pet. 77; *Potts v. Whitehead*, 23 N. J. Eq. 514; *Hutchinson v. Blakeman*, 3 Met. (Ky.) 80; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *Maclay v. Harvey*, 90 Ill. 525; *Myers v. Smith*, 48 Barb. 614; *Johnson v. Stevenson*, 26 Mich. 63; *McIntosh v. Brill*, 20 Up. Can. C. P. 426; *Minneapolis, etc., Railway v. Columbus Rolling Mill*, 119 U. S. 149; *Eggleston v. Wagner*, 46 Mich. 610; *Maynard v. Tabor*, 53 Me. 511; *Snow v. Miles*, 3 Cliff. 608.

<sup>1</sup> *Bruce v. Pearson*, 3 Johns. 534. See *Corning v. Colt*, 5 Wend. 253; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20.

<sup>2</sup> *Bowker v. Hoyt*, 18 Pick. 553; *Flanders v. Putney*, 58 N. H. 353; *Sentell v. Mitchell*, 28 Ga. 196; *Booth v. Tyron*, 15 Vt. 518; *Ruize v. Norton*, 4 Cal. 355; *Richards v. Shaw*, 67 Ill. 222; *Harralson v. Stein*, 50 Ala. 347; *Goodwin v. Merrill*, 13 Wis. 658; *Shaw v. Badger*, 12 S. & R. 275; *Avery v. Wilson*, 81 N. Y. 341; *Oxendale v. Wetherell*, 9 B. & C. 386; *Richardson v. Dunn*, 2 Q. B. 222. But see apparently *contra*, *Champlin v. Rowley*, 18 Wend. 253; 18 Wend. 187; *Mead v. Golyer*, 16 Wend. 632; *Paige v. Ott*, 5 Denio, 406; *Kein v. Tupper*, 52 N. Y. 555; *Tipton v. Faltner*, 20 N. Y. 423; *Witherow v. Witherow*, 16 Ohio, 238.

was ordered, is retained, while the rest was returned. The person retaining the smaller quantity is liable for their value, on an implied contract to buy that quantity, and is not bound to take the quantity first ordered.<sup>1</sup>

§ 35. **Mistakes of fact.** — Not only does an intentional variance of the acceptance from the offer prevent the completion of the contract of sale, but there will also be no sale where, through a mistake of fact, the parties have failed to agree upon the terms or the subject-matter of the sale. If, for example, one party offered a certain thing for sale, and through a mistake of fact, the offeree accepted under the mistaken belief that he was to get something else; or if there was a misunderstanding of the parties as to the material terms of the sale, there would be no mutual assent to the same contract, and hence no sale. Where the parties have thus failed to agree upon the same thing, neither party is bound by the transaction.<sup>2</sup>

It is also held to be a fatal variance, where one party in dealing with the other, mistakes him for a third person, and enters into a contract of sale, believing that the contract is made with the third person; the courts uniformly hold that

<sup>1</sup> *Hart v. Mills*, 15 M. & W. 85.

<sup>2</sup> *Thornton v. Kempter*, 5 Taunt. 786; *Raffles v. Wichelhaus*, 2 H. & C. 906; *L. J. Ex.* 160; *Henkel v. Pope*, L. R. 6 Ex. 7; *Phillips v. Bistoll*, 2 B. & C. 511; *Mudge v. Oliver*, 1 Allen, 74; *Gardner v. Lane*, 9 Allen 492; *Decan v. Shlpper*, 85 Pa. St. 289; *Allen v. Hammond*, 11 Pet. 63; *Hartford, etc., R. R. Co. v. Jackson*, 24 Conn. 514; *Rovengo v. Defferari*, 40 Cal. 459; *Webb v. Odell*, 49 N. Y. 585; *Calkins v. Griswold*, 18 Hun, 208; *McGoren v. Avery*, 37 Mich. 20; *Winchester v. Howard*, 97 Mass. 304; *Harvey v. Harris*, 112 Mass. 32; *Kyle v. Kavanaugh*, 103 Mass. 356; *Hills v. Snell*, 104 Mass. 173; *Sheldon v. Capron*, 3 R. I. 171; *Rupley v. Daggert*, 74 Ill. 851; *Chapman v. Cole*, 12 Gray, 141; *Hutmacher v. Harris*, 88 Pa. St. 491; *Durfee v. Jones*, 11 R. I. 588; *Bowen v. Sullivan*, 62 Ind. 281; *Gibson v. Pelkie*, 37 Mich. 380; *Greene v. Bateman*, 2 W. & M. 359; *Utley v. Donaldson*, 94 U. S. 29; *Ketcham v. Catlin*, 21 Vt. 191; *Byers v. Chapin*, 28 Ohio St. 300; *Barker v. Dinsmore*, 72 Pa. St. 427; *Livermore v. White*, 74 Me. 452; *Ray v. Light*, 34 Ark. 421.

there is no sale. The English cases seem to require that the enforcement of the contract must be shown to be prejudicial to the party making the mistake, in order that the mistake as to the other party may avoid the transaction. For example, it would be prejudicial to the party making the mistake, where he had a set-off against the party with whom he supposed he was contracting.<sup>1</sup> But, in the United States, the transaction is avoided, without affirmative proof of prejudice to the person who makes the mistake.<sup>2</sup>

But it is not every mistake which will avoid a contract of sale. In order that the mistake may have that effect, it must refer to the express terms of the sale, or to the subject-matter of the sale. If it has reference to some collateral fact or circumstance, which was not expressed or referred to in the negotiations, but which was in the mind of one of the parties at that time, as, for example, an impression that the thing was suitable for a special use, the mistake is held not to have been made in the terms of the con-

<sup>1</sup> *Mitchell v. Lepage*, Holt N. F. 253; *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117. See, also, to same effect, *Johnson v. Raylton*, 7 Q. B. D. 438 C. A.; *Ex parte Barnett*, 3 Ch. D. 123.

<sup>2</sup> *Boston Ice Company v. Potter*, 123 Mass. 28, 31, Endicott, J.: "The fact that the defendant in a particular case has a claim in set-off, against the original contracting party, shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would be unavailable. But the actual existence of the claim in set-off, cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that, because it does not exist, the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defense to it. \* \* \* It is, therefore, immaterial that the defendant had no claim in set-off against the Boston Ice Company." See, also, *Aborn v. Merchants' Transportation Co.*, 135 Mass. 283; *Rodliff v. Dallinger*, 141 Mass. 1; *Dean v. Yates*, 22 Ohio St. 388; *Hamet v. Letcher*, 27 Ohio St. 356; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *McCullis v. Allen*, 57 Vt. 505; *Barker v. Dinsmore*, 72 Pa. St. 427.

tract, and hence the sale is valid notwithstanding.<sup>1</sup> And so, also, where one sold a hundred chests of tea by the wrong sample, the mistake was held to have no effect upon the validity of the sale, if the purchaser was willing to take the tea, which the vendor had intended to sell.<sup>2</sup> The mistake was not in the subject-matter, but in giving a warranty that the tea was of the quality of the sample.

But it must be remembered that where a mistake is not mutual, and the other party has acted upon the declared, but mistaken, intention of the first party, the first party is estopped from denying that the declared intention was his real intention. Where the mistake is mutual, and especially where it is obvious, the courts may order a reformation of the bill of sale, so that it may conform to the intentions of the parties.<sup>3</sup>

**§ 36. Counter-proposition works rejection of original offer — Effect of subsequent acceptance.** — If the response to an offer be a counter-proposition, varying in some material respect from the original offer, it is a virtual rejection of the original offer; and if the counter-proposition is likewise rejected, the offeree cannot afterwards accept the original offer and hold the offerer to his proposition against his will. The offerer is not bound by an acceptance which is made after a rejection of his offer. He is not supposed to continue his offer, after it has been

<sup>1</sup> *Williams v. Hathaway*, 19 Pick. 387; *Wheat v. Cross*, 31 Md. 99; *Smith v. Ware*, 13 Johns. 257; *Taylor v. Fleet*, 4 Barb. 95; *Chanter v. Hopkins*, 4 M. & W. 399; *Mondell v. Steel*, 3 N. & W. 358; *Foster v. Smith*, 18 C. B. 156; *Ollivant v. Bayley*, 5 Q. B. 288; *Pudeau v. Bunnnett*, 1 C. B. (N. s.) 613.

<sup>2</sup> *Scott v. Littledale*, 3 E. & B. 815; 27 L. J. Q. B. 201; *Megaw v. Modloy*, 2 Ir. L. R. C. P. D. 530.

<sup>3</sup> *Wilson v. Willson*, 5 H. L. C. 40; *Burchell v. Clark*, 2 C. P. D. 88, C. A.; *Bird's Trust*, 3 Ch. D. 214; *Anon. in Bache v. Proctor*, Dougl. 384; *Lloyd v. Lord Say et al.*, 10 Mod. 46; 4 Browne P. C. 73.

rejected.<sup>1</sup> But in order that there may be an implied rejection of the original offer, there must be a distinct counter-proposition. A mere inquiry, whether the offerer would change his terms, is not such a counter-proposition, which would work a rejection of the original offer, and prevent a subsequent acceptance of it.<sup>2</sup>

§ 37. **Conditional acceptance — When binding.** — Although as a general rule, the acceptance must be absolute and unconditional; and a conditional acceptance does not complete the sale: yet, if that conditional acceptance is in turn agreed to by the original offerer, the sale does become complete, and the title to the goods passes subject to the performance of the condition.<sup>3</sup>

§ 38. **Acceptance must be communicated.** — Not only must there be a concurrence of minds on the same proposition, but where an offer has been made, its acceptance by the other party must be communicated to the offerer. In practical law, it is impossible to take note of an operation of the mind, which is not manifested by word or deed. So an acceptance does not have the effect of completing the contract of sale, until it has been communicated to the offerer, either actually, or constructively through some

<sup>1</sup> *Minneapolis, &c., Railway v. Columbus Rolling Mill*, 119 U. S. 149; *Hyde v. Wrench*, 8 Beav. 334; *Fox v. Turner*, 1 Ill. App. 153. See also *Cartmel v. Newton*, 79 Ind. 1; *McCotter v. Mayor*, 37 N. Y. 325; *Solomon v. Webster*, 4 Col. 353; *Merriam v. Lapsley*, 2 McCrary, 606; *Baker v. Holt*, 56 Wis. 100; *Fulton Brothers v. Upper Canada Furniture Co.*, 9 Ont. App. 211.

<sup>2</sup> *Stevenson v. McLean*, 5 Q. B. D. 346. In this case the offer was for the sale of iron, "for 40s net cash, open till Monday." The telegram from offeree on Monday morning was: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." Held, not a rejection of the original offer, and offerer would be bound by a subsequent acceptance.

<sup>3</sup> *Moss v. Sweet*, 16 Q. B. 493; *Ex parte Wingfield*, In re Florence, 10 Ch. D. 591 C. A.

agency.<sup>1</sup> If the offer is made through an agent, he is impliedly authorized to receive the acceptance, and the contract is complete, when the acceptance is communicated to this agent.<sup>2</sup> Notice to a duly authorized agent is equivalent to notice to the principal.

But the acceptance need not be communicated by express words. The acceptance may be communicated by a nod or other gesture, or it may be implied from the language or conduct of the offeree.<sup>3</sup> The fall of the hammer at an auction sale is as much of an acceptance as if uttered words were used to inform the bidder of the acceptance of his bid.<sup>4</sup> Even silence may under peculiar circumstances amount to an acceptance. And, of course the sending of goods in pursuance of an order for them, is a sufficient acceptance.<sup>5</sup>

But in order that the acceptance may bind the offerer, it must be communicated to the offerer within the time for which the offer was left open for his acceptance, if the time be stipulated.<sup>6</sup> And where no time is stipulated, then it must be accepted within a reasonable time, the offer being held to continue open for acceptance for a reasonable time, unless sooner retracted.<sup>7</sup> What is a reasonable time is a

<sup>1</sup> *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Emerson v. Graff*, 29 Pa. St. 358; *Borland v. Guffey*, 1 Grant, 394; *White v. Corliss*, 46 N. Y. 467; *Beckwith v. Cheever*, 21 N. H. 41; *Brogden v. Metropolitan Railway Co.*, 2 App. Cas. 666.

<sup>2</sup> *Trevor v. Wood*, 36 N. Y. 306; *Mactier v. Frith*, 6 Wend. 103.

<sup>3</sup> *Joyce v. Swann*, 17 C. B. (N. S.) 84, 101; *Gowing v. Knowles*, 118 Mass. 232; *Street v. Chapman*, 29 Ind. 142; *Payne v. Cave*, 3 T. R. 148; *Hoadley v. McLaine*, 10 Bing. 482, 487.

<sup>4</sup> *Payne v. Cave*, 3 T. R. 148.

<sup>5</sup> *Brogden v. Metrop. Railway Co.*, 2 App. Cas. 666; *Taylor v. Jones*, L. R. 1 C. P. D. 87, 90; *Crook v. Cowan*, 64 N. C. 743.

<sup>6</sup> *Curtis v. Blair*, 26 Miss. 325; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Longworth v. Mitchell*, 26 Ohio St. 384; *Boston, &c., R. R. Co. v. Bartlett*, 3 Cush. 224.

<sup>7</sup> *Loving v. Boston*, 7 Met. 409; *Martin v. Black*, 21 Ala. 721; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. 431; *Craft v. Isham*, 13 Conn.



question of law for the court, to be determined by a consideration of the facts of each case.<sup>1</sup>

§ 39. **Communication by mail, telegraph, telephone, phonograph.**— Where the negotiations for a sale are conducted by the parties personally, or through duly authorized private agents, it is very plain that the sale is complete when the acceptance has been communicated to the offerer or to his duly authorized agent. And any failure of the agent to notify his principal of the acceptance of his offer would not affect the validity of the contract of sale. This is too general a proposition of the law of agency to require any citation of authority.

At an early day, all means of communication were through private agencies. The mail was transported by private individuals. Hence, when by the case of *Mactier v. Frith*,<sup>2</sup> it was decided that the sale was complete, when the letter of acceptance was mailed, in response to a mailed letter, containing the offer, the court merely decided that, by sending the offer through the mail, the offerer made the mail his agent for the receipt of the acceptance; and that, under the existing commercial custom, the acceptance was constructively communicated to the offerer, when the letter of acceptance was deposited in the mail for transmission to the offerer. Many of the courts rest their decision upon the inability of having both parties become acquainted with the completion of the contract at the same time, and upon the necessity of fixing upon some time for the completion of the contract.<sup>3</sup> But it would appear

41; *Averill v. Hedge*, 12 Conn. 424; *Peru v. Turner*, 10 Me. 185; *Chicago, &c., R. R. Co. v. Dane*, 48 N. Y. 240.

<sup>1</sup> *Chicago, &c., R. R. Co. v. Dane*, 48 N. Y. 240. See also cases in preceding note.

<sup>2</sup> 6 Wend. 306.

<sup>3</sup> In *Mactier v. Frith*, Marcy, J., said: "If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be ob-

that the theory of agency would provide more logical satisfaction, by showing that an authorized agent of the offerer had received notice of the acceptance. The fact that the post has become a public agency, does not prohibit the application of the theory. One may make a public agency his own agent, just as well as some private individual. But whether the ruling of the courts is made to rest upon one ground or upon the other, it is very well settled now that, in the case of negotiations by mail, the sale is complete when the letter of acceptance is deposited in the mail; and that the contract is binding upon both parties, although the letter of acceptance should never reach the offerer.<sup>1</sup> The courts have also applied the rule to cases

ligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation, therefore, does not arise from a knowledge of the present concurrence of the wills of the contracting parties. All the authorities state a contract or an agreement (which is the same thing) to be *aggregatio mentium*. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory?" See, also, *Adams v. Lindsell*, 1 B. & Ald. 681: "If that were so (that the mailing of the acceptance did not complete the contract), no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiff till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

<sup>1</sup> *Chiles v. Nelson*, 7 Dana, 281; *Mactler v. Frith*, 6 Wend. 103; *Taylor v. Insurance Co.*, 9 How. 390; *Vassar v. Camp*, 11 N. Y. 441; *s. c.* 14 Barb. 341; *Abbott v. Shepard*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196; *Bryant v. Booze*, 55 Ga. 438; *Levy v. Cohen*, 4 Ga. 1; *Wheat v. Cross*, 31 Md. 103; *Hamilton v. Insurance Co.*, 5 Pa. St. 339; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Adams v. Lindsell*, 1 B. & Ald. 681; *Brisham v. Boyd*, 4 Paige, 17; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 97; *Hallock v. Insurance Co.*, 26 N. J. Law 282; *Moore v. Pierson*, 6 Iowa, 279; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Lungstrass v. German Ins. Co.*,

where the offer had been made and accepted by telegraph. The contract is held to be complete, when the telegram announcing his acceptance has been deposited by the offeree with the telegraph company; and the contract is binding, although the telegram of acceptance is never received by the offerer.<sup>1</sup>

If the offer is communicated by mail, and the acceptance is communicated by telegraph, it is doubtful when the contract is complete. If the theory of agency is made to support the conclusion of the courts, the contract would in this case be held to be incomplete, as long as the notice of acceptance has not been received. For, since the acceptance has not been communicated through the same agency, by which the offer was made, the deposit of the notice of acceptance with a new agency makes that agency the agent of the acceptor, and therefore the notice of acceptance must be delivered to the offerer, or his duly authorized agent, before the contract is complete and binding.

But in all these cases, the parties may by express agreement provide that the contract will not be binding until the acceptance has been received by the offerer.<sup>2</sup>

The telephone has lately come into general use as a means of communication. Inasmuch as the communication by telephone is personal, although the parties are at a distance from and out of the sight of, each other, the ordinary rules of personal communication apply; and the only doubtful

48 Mo. 204; Washburn v. Fletcher, 42 Wis. 152; Haas v. Myers, 111 Ill. 421; Winterport, &c., Co. v. Schooner Jasper, 1 Holmes, 101; Ferrier v. Storer, 63 Iowa 484. This rule has been adopted in a case where the letter of acceptance was dropped in the letter box of the offerer at his place of business, and had never reached the offerer. See Howard v. Daly, 61 N. Y. 362.

<sup>1</sup> Trevor v. Wood, 36 N. Y. 307; Minnesota Oil Co. v. Collier Lead Co., 4 Dill. 431; Durkee v. Central Railway Co., 29 Vt. 127; Thorne v. Barwick, 16 Up. Can. C. P. 369; Marshall v. Jamison, 42 Up. Can. Q. B. 120; Perry v. Mt. Hope Iron Co., 15 R. I. 66.

<sup>2</sup> Lewis v. Browning, 130 Mass. 173.

question that can arise in such cases is the question of fact whether the person to whom or by whom the offer or acceptance was communicated, was the principal or some duly authorized agent. This may at times prove to be very difficult of proof, in consequence of the difficulty sometimes experienced in recognizing voices.

The phonograph has not yet come into general use, and hence it cannot be stated how far its general use will affect the law in respect to the requirement of communication of acceptances. The fact that the communication when made will be in the spoken words of the principal or of his authorized agent, would be likely to class such communications as personal. But on the other hand, the phonographic communication may be transmitted by mail or express, and it might fail to reach the parties. These questions will not now require any settlement.

§ 40. **Right to retract offer.** — Until the contract has become complete by acceptance, no one is bound by the previous negotiations, unless there has been a binding contract to leave the offer open for a stipulated time.<sup>1</sup> Ordinarily, there is no complete contract, and the offer may be withdrawn, although the offerer has agreed to leave the offer open for acceptance for a stated time. The offer may be retracted, as long as there has been no acceptance. But, in order that the offer may be retracted, the retraction must be communicated to the offeree before he has accepted the offer.<sup>2</sup> Where the negotiations are conducted by the mail,

<sup>1</sup> See *post*, § 41, for a discussion of the question, when the contract for an option is binding.

<sup>2</sup> *Cooke v. Oxley*, 3 T. R. 653; *Dickenson v. Dodds*, 2 Ch. D. 463, C. A.; *Stevenson v. McLean*, 5 Q. B. D. 346; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Routledge v. Grant*, 4 Bing. 653; *Payne v. Cave*, 3 T. R. 148; *Head v. Diggon*, 3 M. & R. 97; *Burton v. Great Northern Railway Co.*, 9 Ex. 507; *Great Northern Railway v. Witham*, L. R. 9 C. P. 16; *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145; *Taylor v. Wakefield*, 6 E. & B. 765; *Chicago and Great Eastern Railway Co. v. Dana*, 43 N.

the notice of retraction must be received by the offeree before he has mailed his acceptance, for the contract ordinarily becomes complete when the letter of acceptance is deposited in the mail.<sup>1</sup> If the parties have agreed that the contract does not become complete, until something else is done or happens, as where it is agreed that the contract is not binding until the letter of acceptance is received by the offerer, or until the contract has been reduced to writing and signed by the parties,<sup>2</sup> the time of retraction is of course extended until that is done which is required to complete the contract.

If the offerer dies before acceptance, the offer is necessarily revoked by his death, since a dead man cannot become a party to a contract.<sup>3</sup>

Objection has been raised to the doctrine that a retraction must be communicated to the offeree, before the offer can be withdrawn, on the ground that the mental withdrawal of the offer destroys that *aggregatio mentium*, which is said to be necessary to every contract.<sup>4</sup> And this is the position taken by the civilians<sup>5</sup> according to whom in such a case, there is no sale, but if the offeree has relied to his loss upon the completion of the contract, the offerer is bound to in-

Y. 240; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; *Summers v. Mills*, 21 Tex. 77, 87; *Hebb's Case*, L. R. 4 Ex. 9.

<sup>1</sup> *Adams v. Lindsell*, 1 B. & Ald. 681; *Potter v. Saunders*, 6 Hare 1; *Eskridge v. Glover*, 5 Stew. & P. 264; *Faulkner v. Heberd*, 26 Vt. 452; *Dunlop v. Higgins*, 1 H. L. C. 381; *Beckwith v. Cheever*, 21 N. H. 41; *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216, C. A.; *Byrne v. Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Harris' Case*, 7 Ch. 587; *Chicago & Great Eastern Railway Co. v. Dana*, 43 N. Y. 240.

<sup>2</sup> *Governor, Guardians, etc., of the Poor of Kingston-upon-Hull v. Petch*, 10 Ex. 610; 24 L. J. Ex. 23.

<sup>3</sup> See *Dickenson v. Dodds*, 2 Ch. D. 475.

<sup>4</sup> Story on Sales, § 127. See *McCulloch v. Eagle Ins. Co.*, 1 Pick. 281; *Boston & Me. R. R. Co. v. Bartlett*, 3 Cush. 224; *Halleck v. Com. Ins. Co.*, 2 Dutch. (N. J.) 268.

<sup>5</sup> *Pothier Contrat de Vente*, No. 32.

demnify him for this loss. But the practical rule of the American law, that an uncommunicated mental operation has no legal existence, is a sufficient answer to this technical objection.

§ 41. **When contract for option is binding.**— Very often an agreement is made that the offer shall be left open for acceptance for a stipulated time. This agreement is, or is not, a binding contract, according to the presence or absence of the essential elements of a contract. If the agreement for the option is itself based upon a valuable consideration, it is binding upon the offerer, but otherwise it is *nudum pactum*, and can in no way affect the right of retraction. The authorities state very generally that a binding contract for an option for a given time prevents any retraction of the offer during that time.<sup>1</sup> And, very likely, this statement would not ordinarily lead to any serious error. But it would seem to be more consistent with principle to hold that the binding contract to leave the offer open does not prevent the retraction of the offer, since it is idle to speak of an *aggregatio mentium* after the offer has been withdrawn, and the retraction has been communicated to the offeree. The civilians are right in holding that there is no contract of sale in such a case. But the retraction of the offer in such a case would be a breach of the contract to leave the offer open for acceptance, and the offerer would be liable for all damage which flows from his breach of this contract. But he would not be liable for the breach of any contract of sale, for there is no completed contract of sale. The damages would be the same, whatever theory prevailed; but if the offeree asked for specific performance of the contract of sale, his right to it would depend upon the existence of a completed contract of sale.

<sup>1</sup> See *Cheny v. Smith*, 8 Humph. 19; *Routledge v. Grant*, 3 C. & P. 267; 4 Bing. 653; *Cheny v. Cook*, 7 Wis. 413; *Dickenson v. Dodds*, 2 Ch. D. 468; *School Directors v. Trefathren*, 10 Bradw. 127.

§ 42. **Retraction of acceptance.** — It has been held in Scotland, that if notice of the retraction of an acceptance is received before, and simultaneously with, the receipt of the notice of acceptance, the contract is not binding.<sup>1</sup> But so far as there has been any expression of judicial opinion elsewhere, the English and American courts would hold the contract to be complete when the letter or telegram of acceptance had been dispatched and deny the right to prevent the enforcement of the contract by any subsequent retraction of the acceptance.<sup>2</sup>

§ 43. **When assent not necessary.** — The assent is never necessary in implied and involuntary sales. For in all such cases the transfer takes place by operation of law. The most common case is the transfer of property to the defendant, in consequence of a recovery of damages in the action of trover.<sup>3</sup> Some of the authorities have held that an unsatisfied judgment in trover operates as a transfer of the title to the property converted.<sup>4</sup> But the better opinion is that the judgment must be satisfied, before the transfer is effected.<sup>5</sup>

The subject of involuntary sales is treated in a subsequent chapter.<sup>6</sup>

<sup>1</sup> *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190.

<sup>2</sup> *Dicta* of Lord Blackburn in *Brogden v. Metropolitan Railway Co.*, 2 App. Cas. 691; of James, L. J., in *Harris' Case*, 7 Ch. 591; of Thesiger, L. J., in *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 219. But see, *contra dictum* of Bramwell, L. J., in *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 235. See, also, *contra dictum* of Cockburn, C. J., in *Newcombe v. De Roos*, 2 E. & E. 271.

<sup>3</sup> *Cooper v. Shepherd*, 3 C. B. 266; *Chinnery v. Viall*, 5 H. & N. 288; *L. J. Ex.* 180; *Adams v. Boughton*, 2 Str. 1078; *Holmes v. Wilson*, 10 A. & E. 5037; *Barnett v. Brandon*, 6 M. & G. 640, note; *Hepburn v. Sewall*, 5 H. & J. 211; *Osterhout v. Roberts*, 8 Cow. 48; *Marader v. Cornell*, 62 N. Y. 220; *Thayer v. Manley*, 78 N. Y. 309; *Fox v. Pritchett*, 84 N. J. L. 13; *Lovejoy v. Murray*, 3 Wall. 16; *Brady v. Whitney*, 24 Mich. 154.

<sup>4</sup> *Floyd v. Browne*, 1 Rawle, 121; *Marsh v. Pier*, 4 Rawle, 287.

<sup>5</sup> *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Ex parte Drake*, 5 Ch. D. 866, C. A.; *White v. Philbrick*, 5 Greenl. 152.

<sup>6</sup> See *post*, Chap. XVII.

## CHAPTER IV.

### THE PRICE.

SECTION 45. Necessity of a price— Indirect stipulation of the price.

46. Determination of price referred to valuers.

47. When price is provided by implication of law.

§ 45. Necessity of a price — Indirect stipulation of the price. — As it has been explained already,<sup>1</sup> a sale is a contract for the absolute transfer of personal property *for a price*. The provision of a price in some way or form is therefore essential to the character of a sale, and it distinguishes a sale from a gift. So important an element of a sale is the price, that a failure to stipulate or agree upon the price, will always prevent the completion of a sale, unless the goods have been delivered to the vendee,<sup>2</sup> or unless the buyer has prevented the determination of the price, when the law will imply the price to be what the thing is reasonably worth.<sup>3</sup>

But the price need not be directly stipulated. The stipulation may be indirect and descriptive, as where it is agreed to be “ten cents a bushel less than the Milwaukee price on any future day the vendor might name.” In such a case the title does pass before the naming of the day.<sup>4</sup>

<sup>1</sup> See *ante*, § 1.

<sup>2</sup> *Wittowsky v. Wasson*, 71 N. C. 451; *Bigley v. Risher*, 63 Pa. St. 152; *Thurnell v. Balbirnie*, 2 C. B. 786; *Vickers v. Vickers*, 4 Eq. 529; *Wilkes v. Davis*, 3 Mer. 507; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114; *Milnes v. Gery*, 14 Ves. 400; *Fuller v. Bean*, 34 N. H. 290; *Hulton v. Moore*, 26 Ark. 382.

<sup>3</sup> *Humaston v. Am. Tel. Co.*, 20 Wall. 20; *Smyth v. Craig*, 3 Watts & S. 14; *Clark v. Westroppe*, 18 C. B. 765; 25 L. J. C. P. 287.

<sup>4</sup> *McCannell v. Hughes*, 29 Wis. 537. See, also, *Cunningham v.*



If the parties should disagree in their testimony what was the price agreed upon, it is competent to show which of the parties was right, by proving the real value of the thing.<sup>1</sup>

§ 46. **Determination of price referred to valuers.**— It is sometimes agreed between the parties that the determination of the price should be left to third persons, who are charged with the estimation of the value and price of the goods. This satisfies the requirement of the law, and until the price is determined there is no sale, unless the parties have executed the contract, and delivered the goods, when the law will imply a promise to pay what is the reasonable worth of the goods,<sup>2</sup> and so, also, where the buyer prevented the valuation of the goods, he will be required to pay what they are reasonably worth.<sup>3</sup>

§ 47. **When price is provided by implication of law.**— Whenever the parties to the contract of sale have failed for any reason to stipulate the price, and in every other respect the contract of sale is complete, the deficient element will be supplied by the implication of law that the parties had agreed to pay what the goods were reasonably worth. And the reasonable value is ordinarily determined

*Brown*, 44 Wis. 72 ("for the same as similar articles may bring afterward at auction"); *Ames v. Quimby*, 96 U. S. 324; *McBride v. Silverthorne*, 11 Up. Can. Q. B. 545.

<sup>1</sup> *Rennell v. Kimball*, 5 Allen, 365; *Parker v. Cabnan*, 10 Allen, 82; *Bradbury v. Dwight*, 3 Met. 31; *Saunders v. Clark*, 106 Mass. 331; *Brewer v. Housatonic R. R. Co.*, 107 Mass. 277; *Norris v. Spofford*, 127 Mass. 85; *Johnson v. Harder*, 45 Iowa, 677.

<sup>2</sup> *Brown v. Bellows*, 4 Pick. 189; *Norton v. Gale*, 95 Ill. 533; *Fuller v. Bean*, 34 N. H. 290; *Hulton v. Moore*, 26 Ark. 382; *Thurnell v. Balbirnie*, 2 C. B. 786; *Vickers v. Vickers*, 4 Eq. 529; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114; *Milness v. Gery*, 14 Ves. 400.

<sup>3</sup> *Humaston v. Am. Tel. Co.*, 20 Wall. 20; *Smyth v. Craig*, 3 Watts & S. 14; *Clark v. Westroppe*, 18 C. B. 765; 25 L. J. C. P. 287.

by the market price at the time and place of delivery.<sup>1</sup> But when the market is shown to be unduly inflated, some other method of determining the reasonable worth of the goods must be adopted.<sup>2</sup> It was once doubted whether an executory contract of sale was binding on the parties, where the parties had not agreed upon a price.<sup>3</sup> But it is now the established rule that the executory, as well as the executed, contract of sale is binding, notwithstanding there has been no express agreement as to the price, the law in all such cases implying that the parties had agreed to pay the value of them.<sup>4</sup>

<sup>1</sup> *McEwen v. Morey*, 60 Ill. 82; *Fenton v. Braden*, 2 Cranch C. C. 550.

<sup>2</sup> *Kountz v. Kirkpatrick*, 72 Pa. St. 376; In *Acebal v. Levy*, 10 Bing. 376, the court say: "Such a price as the jury upon the trial of the cause shall under all the circumstances, decide to be reasonable. This price may or may not be agreed with the current price of the commodity at the port of shipment, at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

<sup>3</sup> *Acebal v. Levy*, 10 Bing. 376.

<sup>4</sup> *Hoadly v. McLaine*, 10 Bing. 482; *Valpy v. Gibson*, 4 C. B. 837; *Taft v. Travis*, 136 Mass. 95; *McEwen v. Morey*, 60 Ill. 82; *James v. Muir*, 33 Mich. 224.

## CHAPTER V.

### THE THING SOLD.

#### SECTION 50. Sale of what has ceased to exist.

51. Sale of thing not yet existing or not yet owned by the vendor.

52. Sale of a thing in potential existence.

53. The rule in equity.

§ 50. Sale of what has ceased to exist. — There cannot be a sale without there being a thing sold. Hence if one contracts to sell what has ceased to exist, either at the time when the contract was made,<sup>1</sup> or before the time when the contract was to be executed,<sup>2</sup> there cannot be any valid contract of sale, executory or executed.

§ 51. Sale of thing not yet existing or not yet owned by the vendor. — For the same reason, there can be no actual sale, *i.e.*, an executed contract of sale, at law, where the thing sold does not yet exist, or is not yet acquired by the vendor.<sup>3</sup> In most of the cases, in which the question arises,

<sup>1</sup> *Strickland v. Turner*, 7 Ex. 208; *Hastie v. Conturier*, 9 Ex. 102; *s.c.* 5 H. L. C. 678; *Barr v. Gibson*, 8 M. & W. 390; *Smith v. Myers*, L. R. 5 Q. B. 429; 7 Q. B. 139; *Cochrane v. Willis*, 1 Ch. 58; 85 L. J. Ch. 86.

<sup>2</sup> *Dexter v. Norton*, 47 N. Y. 62; *Young v. Bruces*, 5 Litt. 324; *Harris v. Nicholas*, 5 Munf. 483; *Carpenter v. Stevens*, 12 Wend. 589.

<sup>3</sup> *Reed v. Blades*, 5 Taunt. 212, 222; *Lunn v. Thornton*, 1 C. B. 379; *Brown v. Bateman*, L. R. 2 C. P. 272; *Gittings v. Nelson*, 86 Ill. 591; *Chesley v. Joselyn*, 7 Gray, 489; *Jones v. Richardson*, 10 Met. 481; *Moody v. Wright*, 18 Met. 17; *Head v. Goodwin*, 37 Me. 182; *Emerson v. European, etc., R. R. Co.*, 67 Me. 387; *Cressy v. Sabre*, 17 Hun, 120; *Barnard v. Eaton*, 2 Cush. 295; *Codman v. Freeman*, 3 Cush. 306; *Chapin v. Cram*, 40 Me. 561; *Gale v. Burnell*, 7 Q. B. 850; *Hope v. Hayley*, 5 E. & B. 830; 25 L. J. Q. B. 155; *Carr v. Allatt*, 27 L. J. Ex. 385; *Congreve v. Evetts*, 10 Ex. 298; 28 L. J. Ex. 278; *Chidell v. Gallsworthy*, 6 C. B.

there is a contest between the vendee and some attaching creditor or mortgagee of the vendor. But, although there are a few authorities, which maintain that, as between the parties, the sale is complete, and the title passes at law to the vendee, as soon as the subject of the sale comes into being or is acquired by the vendor,<sup>1</sup> the better opinion is, that no title passes in any such case, unless the executory contract of sale becomes executed by the subsequent acquisition of the possession by the vendee, and before the rights of third persons have intervened. In that case, the title is good against third persons, as well as against the vendor himself.<sup>2</sup> This is in conformity with the general rule, that the non-existence of the thing does not affect the sale, as an executory contract, and that the executory contract may be enforced as soon as the thing sold comes into being or is acquired by the vendor.<sup>3</sup>

§ 52. Sale of a thing in potential existence. — But it has been very generally held that where a thing is in potential existence, as, for example, all the wool from a flock of sheep, or a growing crop, a present sale with present transfer of title may be made of it, even as to third persons,

(N. S.) 471; *Noakes v. Nicholson*, 34 L. J. C. P. 273; 19 C. B. (N. S.) 290; *Otis v. Lill*, 8 Barb. 102; *Gardner v. McEwen*, 19 N. Y. 123; *Millman v. Neber*, 20 Barb. 37; *Rice v. Stone*, 1 Allen, 569; *Williams v. Briggs*, 11 R. I. 476; *Hunter v. Bosworth*, 43 Wis. 583; *Hamilton v. Rogers*, 8 Md. 301; *Wright v. Bircher*, 5 Mo. App. 327. See *post*, § 230.

<sup>1</sup> *Allen v. Goodnow*, 71 Me. 420; *Frazier v. Hilliard*, 2 Strobb. 309; *Deering v. Cobb*, 74 Me. 334.

<sup>2</sup> *Cook v. Corthell*, 11 R. I. 432; *Rowley v. Rice*, 11 Met. 333; *Rowan v. Sharp's Rifle Co.*, 29 Conn. 233; *Chynoweth v. Tenney*, 10 Wis. 397; *Chase v. Denny*, 130 Mass. 566; *Chapman v. Weiner*, 4 Ohio St. 481; *Walker v. Vaughan*, 33 Conn. 577.

<sup>3</sup> *Stanton v. Small*, 3 Sandf. 230; *Casard v. Hinman*, 1 Bosw. 207; *Tyler v. Barrows*, 6 Roberts, 104; *Clarke v. Foss*, 7 Biss. 541; *Reed v. Blades*, 5 Taunt. 212, 222; *Lunn v. Thornton*, 1 C. B. 379; *Hibblewhite v. Morine*, 5 M. & W. 462; *Mortimer v. McCallan*, 6 M. & W. 58; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Appleman v. Fisher*, 34 Md. 551. Whether such contracts are void as wagers, see *post*, Chap. XX.

having claims against the vendor.<sup>1</sup> There are many authorities which hold that the title can pass, even as to third persons, especially where possession is taken before the rights of third persons can intervene, where the sale was made of a crop, before it was even sown.<sup>2</sup> So, also, it has been held that the sale of the unborn young of animals is valid, although made before pregnancy.<sup>3</sup>

§ 53. **The rule in equity.** — But in the court of equity, as long as the thing may be identified by the description contained in the bill of sale, the contract is valid, although the thing sold may not be even in potential existence or in potential possession of the vendor. In equity the title will pass to the vendee, as soon as the property comes into existence or into the possession of the vendor.<sup>4</sup> Since

<sup>1</sup> 14 Viner's Abr., Tit. Grant, p. 50; *Grantham v. Hawley*, Hob. 132; *Robinson v. Macdonnel*, 5 M. & S. 228; *Wood and Foster's Case*, 1 Leon. 42; *Cotton v. Willoughby*, 83 N. C. 75; *Sanborn v. Benedict*, 78 Ill. 309; *Hansen v. Dennison*, 7 Bradw. 73; *Stephens v. Tucker*, 55 Ga. 543; *Wilkinson v. Ketler*, 69 Ala. 435. See *Tiedeman's Real Property*, § 799, for a discussion of the question, whether the sale of a growing crop is the sale of real or personal property. See, also, *post*, § 59.

<sup>2</sup> *Rawlings v. Hunt*, 90 N. C. 270; *Watkins v. Wyatt*, 9 Baxt. 250; *Conderman v. Smith*, 41 Barb. 404; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Arques v. Wasson*, 51 Cal. 620; *Moore v. Byram*, 10 S. C. 452; *Parker v. Jacobs*, 14 S. C. 112; *Hurst v. Bell*, 72 Ala. 336; *Van Hoozer v. Cory*, 84 Barb. 9; *Smith v. Atkins*, 18 Vt. 461; *Headrick v. Brattain*, 63 Ind. 438. But see, *contra*, *Hutchinson v. Ford*, 9 Bush. 318; *Milliman v. Nahm*, 20 Barb. 38 (overruled); *Comstock v. Scales*, 7 Wis. 159; *Collier v. Faulk*, 69 Ala. 58 (overruled); *Redd v. Burrus*, 58 Ga. 574; *Gittings v. Nelson*, 86 Ill. 591.

<sup>3</sup> *Hall v. Hall*, 48 Conn. 250; *Fonville v. Casey*, 1 Murphy (N. C.), 389; *McCarty v. Blevins*, 5 Yerg. 195; *Sawyer v. Gerrish*, 70 Me. 254.

<sup>4</sup> *Holroyd v. Marshall*, 10 H. L. C. 191; *Reeve v. Whitmore*, 4 De G. & J. & S. 1; 33 L. J. Ch. 63; *Bolding v. Reed*, 3 H. & C. 955; 34 L. J. Ex. 212; *Mitchell v. Winslow*, 2 Story, 630; *Pennock v. Coe*, 23 How. 117; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phillips v. Winslow*, 18 B. Mon. 431; *Pierce v. Milwaukee R. R. Co.*, 24 Wis. 551; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Williams v. Winsor*, 12 R. I. 9; *Apperson v. Moore*, 30 Ark. 56; *Brett v. Carter*, 2 Low. 458; *Morrill v. Noyes*, 56 Me. 458; *Philadelphia, &c., Co. v. Woelpper*, 64 Pa. St. 366; *Sillers v.*

these contracts only operate as sales in equity, it is well understood that they cannot prevail against third parties who have acquired rights in the property before the possession has been acquired by the vendee and without notice of the equitable sale. But in England, by a late statute, the equity rule is now applied in law, as well as in equity.<sup>1</sup>

As already stated, in all such cases of equitable sales, the thing sold must be capable of identification by the description of it in the contract of sale.<sup>2</sup>

Lester, 48 Miss. 513; Barnard v. Norwich, &c., B. R. Co., 4 Cliff. 351; McCaffrey v. Woodin, 65 N. Y. 459; Butt v. Ellett, 19 Wall. 544. But see, *contra*, Phelps v. Murray, 2 Tenn. Ch. 746; Hunter v. Bosworth, 43 Wis. 533; Case v. Fish, 58 Wis. 56.

<sup>1</sup> See Lazarus v. Audrade, 5 C. B. Div. 318; Leatham v. Amor, 47 L. J. Q. B. 581; 38 L. T. R. 735.

<sup>2</sup> In re Count DeEpinévill, 20 Ch. Div. 758; Pennington v. Jones, 57 Iowa, 37.

Bill of Lading  
4 Dated 1852.

## CHAPTER VI.

### THE STATUTE OF FRAUDS, IN RESPECT TO SALES.

**SECTION 55. General provision and effect.**

56. Executory and executed contracts of sale distinguished.
57. Statute applies to all forms of sales — Auction sales.
58. Contracts of sale distinguished from contracts for work and labor done and materials found.
59. What are goods, wares and merchandise — Incorporeal property — Fixtures — Annual and perennial crops — *Fructus naturales*.
60. Statutory limit of value.
61. When does the contract for sale of goods reach or exceed the limit.
62. The conditions of validity under the statute of frauds.
63. Effect of compliance with requirement of acceptance and receipt — Limit as to time.
64. Proof and burden of proof, of acceptance and receipt.
65. Acceptance and receipt by agent.
66. Acceptance and receipt distinguished.
67. What acts constitute acceptance.
68. Whether inspection of goods is necessary to constitute acceptance — Conditional acceptances.
69. What constitutes a receipt of the goods.
70. Acceptance and receipt of part of the goods — Samples.
71. Earnest or part payment.
72. Memorandum or note in writing required — Time of execution.
73. By whom should note be made — Undisclosed principal.
74. To whom note should be addressed.
75. The form of the memorandum — Separate pieces of paper.
76. What the memorandum should contain — Parties — Subject matter — Terms — Consideration — Price.
77. Signature of the party to be charged.
78. Agent duly authorized.
79. Brokers' bought and sold notes.
80. Principal's name need not be signed.

§ 55. General provision and effect. — Independently of statute, a contract of sale of personal property is not re-

quired to be reduced to writing in order to be valid. But the statute of frauds requires the contracts, referred to in the statute, to be manifested or proved by some instrument of writing; and one of the clauses, viz.: the seventeenth section of the original English statute, makes special reference to "contracts for the sale of goods, wares and merchandise." The section, as it appeared in the original statute, and which is substantially reproduced in each of the American copies of the same, is as follows: "No contract for the sale of any goods, wares or merchandises, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

Although the object of the statute of frauds was a very simple one, the inconveniences occasioned to business men by the requirements of the statute developed an intense opposition to any liberal construction of it; and the result has been to cover up the plain meaning of the statute by an overwhelming amount of close and technical interpretation, the purpose of which, more or less concealed or disguised, is to minimize its operation. This general statement is necessary to an appreciation of the points which are raised in the interpretation of the statute in general, and especially in the interpretation of the seventeenth section.

§ 56. **Executory and executed contracts of sale distinguished.** — The first question to arise in the interpretation of the seventeenth section of the statute of frauds, is "what contracts are included in the words 'contracts for the sale of goods, wares and merchandise,'" so as to be brought within the operation of the statute? And the first effort to minimize the operation of the statute was made in



distinguishing between executory and executed contracts of sale, holding that the statute applied only to those few contracts of sale, in which the title passed immediately, without delivery, or in which an immediate performance was anticipated by the parties, and that the statute did not apply to agreements for the future delivery of goods, wares, and merchandise.<sup>1</sup> These English cases have been opposed by others,<sup>2</sup> and, finally, the dispute was settled for England, by "Lord Tenterden's act,"<sup>3</sup> which provides that the seventeenth section of the statute of frauds "shall extend to all contracts for the sale of goods, of the value of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

This English heresy, as it might be called, never obtained a foothold in this country, and the American courts have uniformly held the statute to apply to executory contracts for future delivery, as well as to present sales.<sup>4</sup> So that, it may now be said that the

§ 57. Statute applies to all forms of sales of goods, wares and merchandise. It has thus been held that it applies to auction sales, as well as to private sales.<sup>5</sup>

<sup>1</sup> *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burr. 2101; *Groves v. Buck*, 8 M. & S. 178.

<sup>2</sup> *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 14; *Garbutt v. Watson*, 7 T. R. 14.

<sup>3</sup> 9 Geo. IV. ch. 14, s. 7.

<sup>4</sup> *Newman v. Morris*, 4 H. & McH. 221; *Bennett v. Hull*, 10 Johns. 364; *Hight v. Ripley*, 19 Me. 137; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379; *Carman v. Smick*, 15 N. J. L. 252; *Finney v. Apgar*, 31 N. J. L. 270; *Jackson v. Covert*, 5 Wend. 139; *Ide v. Stanton*, 15 Vt. 685; *Atwater v. Hough*, 29 Conn. 513; *Crookshank v. Burrell*, 18 Johns. 58; *Cason v. Cheely*, 6 Ga. 554; *Waterman v. Meigs*, 4 Cush. 497.

<sup>5</sup> *Davis v. Rowell*, 2 Pick. 64; *Kenworthy v. Schofield*, 2 B. & C. 945;

§ 58. **Contracts of sale distinguished from contracts for work and labor, and materials found.** — In the further effort to minimize the operation of the statute of frauds, it has been held in England and in this country, that the seventeenth section of the statute did not apply to contracts for work and labor, and materials found. And wherever it was possible to hold a contract to be a contract for work and labor and materials found, instead of a contract for the sale of goods, this was done, in order to take the contract out of the statute. The earlier authorities in England seem to hold that every contract for the future delivery of a thing not yet in existence, was a contract for work and labor, and therefore not within the statute of frauds.<sup>1</sup> One other authority held that if the work and labor was of the essence of the contract, it was a contract for work and labor done, and not within the operation of the statute.<sup>2</sup> In still another case, it was held that where the thing would never have been manufactured, but for the order which was given, it was a contract for work and labor, and not a contract for the sale of the thing.<sup>3</sup> There are other English authorities, which introduced variations of the same doctrine.<sup>4</sup> But it is not necessary to give these English cases any minuter examination, since all prior decisions have been overruled by the case of *Lee v. Griffin*.<sup>5</sup> In that case, the action was on a contract made by a subsequently deceased person with a dentist for the manufacture

*Davis v. Robertson*, 1 Mill, 71; *Hinde v. Whitehouse*, 7 East, 558; *Morton v. Dean*, 13 Met. 385; *Johnson v. Buck*, 35 N. J. L. 338; *Sanderlin v. Trustees, R. M. Charlt.* 551; *Pike v. Balch*, 38 Me. 302. It was once doubted by Lord Mansfield, in *Simon v. Motivos*, 3 Burr. 1921; 1 W. Bl. 599.

<sup>1</sup> *Roudeau v. Wyatt*, 2 H. Bl. 63; *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burr. 2101; *Grafton v. Armitage*, 2 C. B. 336; 15 L. J. C. P. 20.

<sup>2</sup> *Clay v. Yates*, 25 L. J. Ex. 237; 1 H. & N. 73.

<sup>3</sup> *Garbut v. Watson*, 5 B. & Ald. 613.

<sup>4</sup> See *Smith v. Summary*, 9 B. & C. 568; *Atkinson v. Bell*, 10 B. & C. 277.

<sup>5</sup> 30 L. J. Q. B. 252; 1 B. & S. 272.

of a set of false teeth, which were not delivered, or tendered, until after the death of the person ordering them. The action was brought for the price agreed upon against the personal representatives, and the defense was that the contract was void under the statute of frauds. The plaintiff maintained that the contract was not within the statute of frauds, because it was essentially a contract for the work, labor and skill of the plaintiff, and that his furnishing of the materials was a secondary and unimportant incident. The court, however, held that it was a contract for the sale of goods, wares and merchandise, and was consequently within the statute.<sup>1</sup>

In America, the question has not yet attained to a definite and satisfactory solution. Two divergent opinions are prevalent in this country, but neither of them conforms to the modern English rule.<sup>2</sup> Without undertaking a minute ex-

<sup>1</sup> Crompton, J., said: "When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendants when it has been sent, then the cause of action is goods sold and delivered. \* \* \* I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labor, and not for the sale of a chattel. It may be, the cause of action is for work and labor when the materials supplied are merely auxiliary, as in the case put of attorney or printer (who furnish paper and ink). But, in the present case, the goods to be furnished, viz.: the teeth, are the principal subject-matter; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplied the article fitted." Blackburn, J., said: "If the contract be such that it will result in the sale of a chattel, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner, as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy. \* \* \* I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel."

<sup>2</sup> A few American cases have, however, adopted the rule of *Lee v. Grif-*

planation of the variance between the earlier and later New York cases, it may be safely said that in New York, the contract is held to be one for the sale of goods, where the contract calls for the future manufacture and delivery of a commodity, where it is not to be manufactured by the vendor. But if the vendor's skill is bargained for, it is a contract for work and labor, and materials found, and therefore not within the statute of frauds.<sup>1</sup> But while the facts of some of the earlier cases do not conflict with this modern ruling,<sup>2</sup> yet there are some cases, which, it seems, cannot be reconciled at all.<sup>3</sup> The Maryland court has followed the earlier New York rule.<sup>4</sup>

The other prevalent American doctrine is that if the contract calls for a special manufacture of a thing, something which the vendor does not keep in stock for his customary trade, and especially, where it cannot be sold generally, then it is a contract for work and labor, and materials found, and the contract is not within the statute of frauds.<sup>5</sup> But if the thing ordered is what the vendor

fin. See *Hardell v. McClure*, 1 Chandl. 271; *Brown v. Sanborn*, 21 Minn. 402; *Prescott v. Locke*, 51 N. H. 94. It has been expressly adopted in the Canadian case of *Wolfender v. Wilson*, 83 Up. Can. Q. B. 442.

<sup>1</sup> *Downs v. Ross*, 28 Wend. 270; *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495; *Miller v. Fitzgibbons*, 9 Daly, 505; *Joy v. Schloss*, 12 Daly, 583; *Seymour v. Davis*, 2 Sandf. 239; *Smith v. N. Y. Cen. R. R. Co.*, 4 Keyes, 180; *Fitzsimmons v. Woodruff*, 1 N. Y. S. C. 3; *Bates v. Coster*, 3 N. Y. S. C. 580; 1 Hun, 400; *Kellogg v. Witherhead*, 4 Hun, 273; *Cooke v. Millard*, 5 Laws. 243; 65 N. Y. 352; *Flint v. Corbitt*, 6 Daly, 429.

<sup>2</sup> See *Bronson v. Wiman*, 10 Barb. 406; *Donovan v. Wilson*, 26 Barb. 188; *Parker v. Schenck*, 28 Barb. 38; *Mead v. Case*, 38 Barb. 202; *Parsons v. Louck*, 4 Roberts, 216; 48 N. Y. 17; *Deal v. Maxwell*, 51 N. Y. 652.

<sup>3</sup> See *Crookshank v. Burrell*, 18 Johns. 58; *Sewall v. Fitch*, 8 Cow. 215; *Robertson v. Vaughan*, 5 Sandf. 1.

<sup>4</sup> *Eichelberger v. McCauley*, 5 H. & J. 213; *Rentch v. Long*, 27 Md. 188.

<sup>5</sup> *Mixer v. Howarth*, 21 Pick. 205; *Spencer v. Cone*, 1 Met. 283; *Godard v. Binney*, 115 Mass. 450; *Dowling v. McKenny*, 124 Mass. 480; *Finney v. Apgar*, 31 N. J. L. 271; *Phipps v. McFarlane*, 3 Minn. 109; *Meincke v. Folk*, 55 Wis. 427; *Hight v. Ripley*, 19 Me. 137; *Abbott v.*

ordinarily sells, and it has not been specially prepared for the vendee, particularly where it can be easily disposed of by sale to others, then the contract is one for the sale of goods, and is within the operation of the statute.<sup>1</sup>

The American editor of Benjamin on Sales (Mr. Bennett) advances the opinion that the rule in *Lee v. Griffin* may be accounted for by the statute of 9 Geo. IV., known as "Lord Tenterden's act," which has been given in a previous paragraph,<sup>2</sup> and that the absence of such a statute in the United States explains the existence of a different rule in this country.<sup>3</sup> It is not difficult to point out the fallacy of this conclusion. The great difficulty to be overcome, in the effort to get this class of cases out of the operation of the statute of frauds, is to satisfactorily explain how the title to the manufactured article becomes vested in the person who orders it, without there being a sale or a gift. It is out of the question to call the transaction a gift, for it is based upon a valuable consideration. And whether the thing ordered is suitable only for the special purpose of the person who orders it, as in the case of a set of false teeth, or it can be utilized to the same advantage by any purchaser, in every case of this kind there must be a sale of something, in order that the manufactured article may be-

*Gilchrist*, 38 Me. 260; *Crockett v. Scribner*, 64 Me. 447; *Allen v. Jarvis*, 20 Conn. 38; *Bennett v. Nye*, 4 Greene (Iowa), 410; *Partridge v. Wilsey*, 8 Iowa, 459; *Brown v. Allen*, 35 Iowa, 306. In Iowa, this rule has been settled and adopted by statute. See, also, *Bird v. Muhlbrink*, 1 Rich 199; *Gadsden v. Lance*, 1 McMul. Eq. 37; *Suber v. Pulling*, 1 S. C. 273; *Rentch v. Long*, 27 Md. 188; *Eichelberger v. McCauley*, 5 Harr. & J. 213; *Woodford v. Patterson*, 32 Barb. 630; *Whitehead v. Root*, 2 Met. (Ky.) 584; *O'Neill v. N. Y., etc., Co.*, 3 Nev. 141.

<sup>1</sup> *Gardner v. Joy*, 9 Met. 177; *Lamb v. Crafts*, 12 Met. 353; *Waterman v. Melgs*, 4 Cush. 497; *Clark v. Nichols*, 107 Mass. 547; *May v. Ward*, 134 Mass. 127; *Edwards v. Grand Trunk Railway*, 48 Me. 379; 54 Me. 105; *Ellison v. Brigham*, 38 Vt. 64; *Atwater v. Hough*, 29 Conn. 509; *Sawyer v. Ware*, 36 Ala. 675.

<sup>2</sup> See *ante*, § 56.

<sup>3</sup> Benjamin on Sales, Ed. 1888, Bennett's note, pp. 103, 104.

come the property of the one who ordered it. If he furnished the materials, then undoubtedly, the increase in the value of the materials through the bestowal of labor and skill would necessarily accrue to the owner of the materials, without any sale. But if the materials are furnished also by the one who expends the labor, since the person ordering owned neither the labor nor the materials, in order that he may acquire the title to the manufactured article, it must have been transferred to him by the manufacturer; and since the transfer was for a valuable consideration, it was nothing else than a sale. It is true that there may have been a sale of the materials first, and secondly, a contract for the work and labor; and the statute may thus be avoided, where the cost of materials was below the amount mentioned in the statute as the minimum value of the goods, in order that the statute may operate. But when one orders a set of false teeth from the dentist, a pair of shoes from the shoemaker, or a suit of clothes from the tailor, he does not first buy the materials, and then contract for the work and labor. The single subject-matter of the contract, is the set of teeth, the pair of shoes, or the suit of clothes. To hold otherwise is to do violence to the plain intentions of the parties.

It was claimed that this doctrine would be carried to the extreme of absurdity, if it were held to be a contract for the sale of goods where an attorney agreed to write up a deed, or the printer to print a book, because he furnished the paper and ink which were used in its execution. And these transactions were conceded to be contracts for work and labor done, on the principle *de minimis non curat lex*.<sup>1</sup>

<sup>1</sup> Benjamin on Sales, § 107. See Blackburn, J., in *Lee v. Griffin*, 30 L. J. Q. B. 252; 1 B. & S. 272. Martin, B., in *Clay v. Yates*, 25 L. J. Ex. 237; 1 H. & N. 73, said: "What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that

But the question, even in these cases, remains to be answered, how did the person ordering the deed or the book acquire title to the deed and book respectively.

It may have been unnecessary, and perhaps unwise, to include this kind of contracts within the operation of the statute of frauds. But the reasonable construction of the statute would necessarily include them.

§ 59. What are goods, wares, and merchandise — Incorporeal property — Fixtures — Annual and perennial crops — *Fructus naturales*. — In the further attempt to limit the operation of the statute of frauds, the English courts have held that this section of the statute of frauds does not apply to incorporeal property, such as shares of stocks, accounts, choses in action, and the like, because these things cannot be called goods, wares and merchandise, the conclusion of the courts being that the statute has reference only to *corporeal* personal property.<sup>1</sup> But a broader rule is adopted in the United States, where it is held that any kind of movable chattel is comprehended under the term “goods, wares and merchandise,” and therefore within this section of the statute of frauds, whether it is corporeal or incorporeal. And the rule has been applied to a variety of incorporeal chattels.<sup>2</sup>

he shall print the work on paper, etc. \* \* \* I think the plaintiff was employed to do work and labor, and supply materials for it. \* \* \* This is a case of work, labor and materials done and provided by the printer for the defendant.”

<sup>1</sup> As to shares of stock, see *Humble v. Mitchell*, 11 A. & E. 205; *Heseltine v. Siggers*, 1 Ex. 856; *Tempest v. Kilner*, 3 C. B. 249; *Bradley v. Holsworth*, 3 M. & W. 422; *Bowlby v. Bell*, 3 C. B. 284; *Duncroft v. Albrecht*, 12 Sim. 189; *Watson v. Spratley*, 10 Ex. 122; 24 L. J. Ex. 53; *Powell v. Jessop*, 18 C. B. 336; 25 L. J. C. P. 199.

<sup>2</sup> Corporate stocks, *Tisdale v. Harris*, 20 Pick. 9; *Boardman v. Cutler*, 128 Mass. 388; *Pray v. Mitchel*, 60 Me. 430; *Fine v. Hornsby*, 2 Mo. App. 61; *North v. Forest*, 15 Conn. 400; *Calvin v. Williams*, 3 H. & J. 38; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359. Bank-bills, *Gooch v. Holmes*, 41 Me. 523; *Riggs v. Magruder*, 2 Cranch C. C. 143. Promissory notes

In every statute of frauds there is another section which provides that a "contract or sale of lands, tenements and hereditaments, or *any interest in or concerning them,*" shall not be actionable unless the contract, or some memorandum thereof, be in writing, signed by the party to be charged. All contracts coming within this section are required in any event to be evidenced by a writing, whereas contracts for the sale of goods, wares and merchandise must be proven by writing, only under the special circumstances enumerated in the seventeenth section. It becomes, therefore, an interesting as well as an important question, under which section of the statute do contracts come, which provide for the sale of things which are by annexation a part of the soil, but which will by severance become personalty. It seems to be a settled doctrine that where the contract does not call for the transfer of title, before the thing has been severed from the soil, it is a contract for the sale of goods, wares and merchandise.<sup>1</sup> But the question becomes very difficult of solution, when the claim is made that the title passes before severance. Out of the contradictions of authorities, the following distinctions may be drawn: If the contract be for the sale of the natural products of the soil, the trees and the fruits of trees, the

and bills of exchange, *Baldwin v. Williams*, 3 Met. 367; *Hudson v. Weir*, 29 Ala. 294. Open accounts, *Walker v. Supple*, 54 Ga. 178. The statute of frauds of New York expressly includes "things in action." See *Artcher v. Zeb*, 5 Hill, 200; *People v. Beebe*, 1 Barb. 379; *Peabody v. Speyers*, 56 N. Y. 230. The statute was held not to apply to a contract to dispose of an interest in an invention before the patent was issued, *Somerby v. Buntin*, 118 Mass. 285; nor to a contract to sell shares of stock in a company not yet organized. *Gadsden v. Lance*, 1 McMull. Eq. 87; *Greed v. Brookins*, 23 Mich. 48. See *Blakeney v. Goode*, 30 Ohio St. 350. The English rule is followed in *Whittemore v. Gibbs*, 24 N. H. 484; *Vawter v. Griffin*, 40 Ind. 600. See *Beers v. Crowell*, *Dudley*, 28, as to checks.

<sup>1</sup> *Smith v. Surman*, 9 B. & C. 561; *Falmouth v. Thomas*, 1 C. & M. 105; *Marshall v. Green*, 1 C. P. D. 35; *Parker v. Staniland*, 11 East, 362; *Sainsbury v. Matthews*, 4 M. & W. 484.



contract is one for the sale of an interest in lands, and comes within the fourth, instead of the seventeenth, section of the statute of frauds.<sup>1</sup> But the American cases hold, in accord with one English case,<sup>2</sup> that if the natural product of the soil is to be severed immediately or within a reasonable time, it matters not by whom, and the purchaser does not expect to derive any further benefit from the connection with the soil, it is a contract for the sale of goods, within the seventeenth section, and not a contract for the sale of an interest in land, and hence within the fourth section.<sup>3</sup> In these cases it is held that the title to the trees, etc., passes immediately, together with a license to go upon the land and cut and remove them, which is irrevocable as to the trees, etc., which are already severed from the soil,<sup>4</sup> but revocable as to those which are still unsevered from the soil.<sup>5</sup>

<sup>1</sup> Crosby v. Wadsworth, 6 East, 602; Waddington v. Bristow, 2 B. & P. 452; Carrington v. Roots, 2 M. & W. 248; Scovell v. Boxall, 1 Y. & Jerv. 896; Teal v. Aulty, 2 Br. & B. 101; Green v. Armstrong, 1 Denio, 550; Kingsley v. Holbrook, 45 N. H. 313; Olmstead v. Niles, 7 N. H. 522; Pattison's Appeal, 61 Pa. St. 294; Huff v. McCauley, 53 Pa. St. 206; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198; Macdonnell v. McKay, 15 Grant (Ont.), 391; Summers v. Cook, 28 Grant (Ont.), 179; White v. Foster, 102 Mass. 375; Howe v. Batchelder, 49 N. H. 204; Buck v. Pickwell, 27 Vt. 157; Slocum v. Seymour, 86 N. J. L. 188; Warren v. Leland, 2 Barb. 618; Vorebeck v. Rowe, 50 Barb. 302; Harrell v. Miller, 35 Miss. 700.

<sup>2</sup> Marshall v. Green, 1 C. P. D. 85.

<sup>3</sup> Whitmarsh v. Walker, 1 Met. 313; Nettleton v. Sikes, 8 Met. 34; Cutler v. Pope, 13 Me. 377; McClintock's Appeal, 71 Pa. St. 865; Smith v. Bryan, 5 Md. 141; Brown v. Stanclift, 80 N. Y. 627; Clafin v. Carpenter, 4 Met. 580; Erskine v. Plummer, 7 Greenl. 447; Banton v. Shorey, 77 Me. 48; Sterling v. Baldwin, 42 Vt. 306; Purney v. Piercy, 40 Md. 212. See Cain v. McGuire, 13 B. Mon. 340; Killmore v. Howlett, 48 N. Y. 569; Byassee v. Reese, 4 Met. (Ky.) 372; Boyce v. Washburn, 4 Hun, 792.

<sup>4</sup> Nelson v. Nelson, 6 Gray, 385; Douglass v. Shumway, 13 Gray, 498; Pierrepont v. Barnard, 6 N. Y. 279; Green v. North Car. R. R. Co., 78 N. C. 524; Cool v. Peters Box Co., 37 Ind. 581.

<sup>5</sup> Giles v. Simonds, 15 Gray, 441; Putney v. Day, 6 N. H. 430; Arm

Where the contract is for the sale of annual crops, the *fructus industriales*, it is universally held to be a contract for the sale of goods, wares and merchandise, and therefore within the seventeenth section of the statute of frauds.<sup>1</sup> But there are several English authorities which expressly hold that where the contract calls for the present transfer of title to the annual crops, it is not a contract for the sale of goods, wares and merchandise, so as to bring it within the seventeenth section of the statute.<sup>2</sup>

It is also held by the American courts that a contract for the sale of fixtures is a contract for the sale of goods, wares and merchandise.<sup>3</sup> But it is, however, held that if the land, to which the fixtures are attached, should be sold to a *bona fide* purchaser, after the contract for the sale of the fixtures, and before their severance from the freehold, the fixtures will pass to the purchaser of the land, as appurtenants, unless they are reserved in the deed.<sup>4</sup> An oral reservation of the fixtures will not prevent them from passing to the purchaser.<sup>5</sup>

strong v. Lawson, 73 Ind. 498; Drake v. Wells, 11 Allen, 141; Owens v. Lewis, 46 Ind. 488. See, also, N. B. & N. S. Land Co. v. Kirk, 1 Allen N. B. 448; Kerr v. Connell, 1 Berton, 188; Mowray v. Gilbert, 1 Hannay, 545.

<sup>1</sup> Bricker v. Hughes, 4 Ind. 146; Brittain v. McKay, 1 Ired. 265; Moreland v. Myall, 14 Bush, 474; Dunne v. Ferguson, 1 Hayes, 540; Marshall v. Ferguson, 23 Cal. 65; Bull v. Griswold, 19 Ill. 681; Evans v. Roberts, 5 B. & C. 886; Jones v. Flint, 10 A. & E. 753; Rodwell v. Phillips, 9 M. & W. 502.

<sup>2</sup> Mayfield v. Wadsley, 3 B. & C. 357; Hallen v. Runder, 1 C. M. & R. 267; Lord Ellenborough in Parker v. Staniland, 11 East, 365.

<sup>3</sup> Bostwick v. Leach, 3 Day, 476; Strong v. Doyle, 110 Mass. 92; Ross' Appeal, 9 Pa. St. 491; Powell v. McAsham, 28 Mo. 70; Shaw v. Corbrey, 13 Allen, 462; Howard v. Fessenden, 14 Allen, 124; Morris v. French, 106 Mass. 326; Central Branch Bk. v. Fritz, 20 Kan. 480; Long v. White, 42 Ohio St. 59; Rogers v. Cox, 96 Ind. 157; Foster v. Mabe, 4 Ala. 402; Scoggin v. Slater, 22 Ala. 687; Dame v. Dame, 38 N. H. 429.

<sup>4</sup> Gibbs v. Estey, 15 Gray, 587; Dolliver v. Ela, 128 Mass. 559; Southbridge Sav. Bank v. Exeter Machine Works, 127 Mass. 542.

<sup>5</sup> Conner v. Coffin, 22 N. H. 538; Bond v. Coke, 71 N. C. 97; Austin v.

In England, a contract for the sale of fixtures is a contract for the sale of an interest in land, and within the fourth section of the statute.<sup>1</sup>

It is very difficult to understand, on general principles, how the title to these annexations and products of the soil can be said to pass under a contract for the sale of goods, etc., before a severance from the soil, and yet the title thus acquired be lost by a subsequent sale of the land to one who is ignorant of the prior sale of the fixtures or product of the soil. And in every such transaction, there is coupled with the contract for the sale of the thing a license to go upon the land for the purpose of severing and removing it from the land. That surely is an interest in and concerning land, whether the thing to be removed be a fixture, a natural or artificial product of the soil. So far at least as the license is concerned, it is a contract for the sale of an interest in land, and must come within the fourth section of the statute.

Another objection to the theory of the authorities that the title passes before severance, is that, until severance, the thing has no separate legal existence, and everything has not been done to complete the contract. There is no delivery and there can be none, until a severance has been effected.

The better opinion, independent of the authorities, would seem to be, that any contract, which undertakes to pass title to anything annexed to the soil, without severance, is a contract for the sale of an interest in land, whatever may be the character of the thing to be severed, and falls within the fourth section of the statute.

Sawyer, 9 Cow. 89; Noble v. Bosworth, 19 Pick. 314. See, *contra*, Pea v. Pea, 35 Ind. 387; Smith v. Odom, 63 Ga. 499 (a statute affecting if not controlling the decision). In Strong v. Doyle, 110 Mass. 92, the oral reservation was made prior to the deed.

<sup>1</sup> Lee v. Gaskell, 1 Q. B. D. 700.

§ 60. **Statutory limit of value.** — The section, which in all the statutes of frauds relates to contracts for the sale of goods, wares and merchandise, prescribes that it will apply only where the value of goods sold reaches a certain value, all contracts for the sale of goods below that amount falling without this section of the statute, and usually valid without writing. The limit of value in the English statute is £10, and in most of the United States it is \$50. But in other States, a different value is established; in Arkansas, Missouri, Maine and New Jersey, \$30; in New Hampshire, \$33; in Vermont, \$40; in Arizona, \$100; in California and Idaho, \$200; in Montana and Utah, \$300; while in Florida and Iowa, no limit is fixed, all contracts for the sale of goods, of whatever value, being within the statute.

§ 61. **When does the contract for sale of goods reach or exceed the limit.** — It becomes a difficult question to determine whether the limit of value has been reached, where one buys several articles, the value of each article being below the statutory limit, but the amount of the entire bill being above it. The question to be determined in such cases is, whether the purchase of each article constituted a separate independent transaction, or only a part of one single transaction. If the purchase of all the articles constituted one transaction, then the contract would fall within the statute, although the value of no one article reached the statutory limit. But if the purchase of each article constituted a separate transaction, then the statute would not apply, unless the value of that article reached the statutory limit. In each case it becomes a question of fact, the answer to which depends upon the peculiar circumstances of the case. Ordinarily, where one undertakes to buy “a bill of goods,” and all the items are incorporated in the same bill of account, it constitutes but a single transaction, and falls within the operation of the statute, if the entire amount reaches or exceeds the statutory limit of

value.<sup>1</sup> But variations as to mode of payment, time of delivery, etc., go very far to making separate transactions out of each item of the bill, if they do not establish the fact.<sup>2</sup> It is also to be presumed, that where, in consequence of the illegality of the sale of some of the items, the legal part is separated from the illegal, and suit allowed on the legal part,<sup>3</sup> that the separation of the illegal from the legal part would necessarily destroy the unity of the transaction, and make as many transactions as there are items purchased.

In accordance with the general principle, already given, the courts have held that the purchase at an auction of different lot of goods on different bids does not constitute one transaction, but as many transactions as there were bids made and accepted; and the statute does not apply to any one purchase, unless the amount of it reached the statutory limit of value.<sup>4</sup> But it has been held that the construction of auction sales does not differ in this regard from other sales, so that a purchase of goods by successive bids at auction will constitute one transaction, although they were made on different days, so far, at least, that the receipt and acceptance of one lot of goods will take all the purchases out of the statute.<sup>5</sup> The American cases, which

<sup>1</sup> *Baldey v. Parker*, 2 B. & C. 37; *Gilman v. Hill*, 36 N. H. 318; *Gault v. Brown*, 48 N. H. 183; *Brown v. Hall*, 5 Lans. 177; *Allard v. Greasert*, 61 N. Y. 1. See *Price v. Lee*, 1 B. & C. 156.

<sup>2</sup> *Aldrich v. Pyatt*, 64 Barb. 391; *Barclay v. Tracy*, 5 W. & S. 45.

<sup>3</sup> See *Walker v. Lovell*, 28 N. H. 138; *Carleton v. Woods*, 28 N. H. 290; *Coburn v. Odell*, 30 N. H. 557; *Goodwin v. Clark*, 65 Me. 280; *Ware v. Curry*, 67 Ala. 274.

<sup>4</sup> *Emmerson v. Heelis*, 2 Taunt. 38; *Rugg v. Minnett*, 11 East, 218; *Couston v. Chapman*, L. R. 22 H. L. Sc. 250; *Roots v. Lord Dormen*, 4 B. & Ad. 77; *Robinson v. Green*, 3 Met. 159; *Wells v. Day*, 124 Mass. 38; *Stoddard v. Smith*, 5 Binn. 355; *Van Eps v. Schenectady*, 12 Johns. 486.

<sup>5</sup> *Jenness v. Wendell*, 51 N. H. 63. See, also, to the same effect, *Mills v. Hunt*, 17 Wend. 333; 20 Wend. 431; *Thompkins v. Haas*, 2 Pa. St. 74; *Coffman v. Hampton*, 2 W. & S. 377; *Kerr v. Shrader*, 1 Weekly N. C. 33. See, also, 1 Salk. 65.

are cited in the earlier note, in support of the doctrine of the English cases, relate to auction sales of real property. While the same principle would govern, whether the contract was for the sale of real or of personal property, in the present condition of the authorities, it must be accepted as the American doctrine, that, in respect to the question under inquiry, no distinction is to be made between auction and other sales.

The fact that it is uncertain, when the purchase was made, whether the bill would reach or exceed the statutory limit, will not prevent the application of the statute. If the amount of the bill, when ascertained reaches the limit, the contract falls within the operation of this section of the statute.<sup>1</sup>

Nor is the contract prevented from falling within the statute, if, along with the sale of goods,<sup>2</sup> it stipulates the performance of some duty. According to an English authority, it seems, that, although the value of the goods could not be recovered, because the contract was not in writing, yet, there could be a recovery of the value of the services rendered under the part of the contract not included in a sale of the goods.<sup>3</sup> But, according to the American authority, no action could be maintained on such a contract for the value of the services, unless the agreed consideration for the same was separate and independent of the price of the goods.<sup>4</sup> The contract in *Harman v. Reeves* was for the sale of a mare and foal, with the obligation on

<sup>1</sup> *Watts v. Friend*, 20 B. & C. 446; *Bowman v. Conn*, 8 Ind. 58; *Carpenter v. Galloway*, 78 Ind. 418; *Gault v. Brown*, 48 N. H. 182; *Brown v. Sanborn*, 21 Minn. 402; *Cox v. Balley*, 6 M. & G. 193; *Hodges v. Richmond Mfg. Co.*, 9 B. I. 482.

<sup>2</sup> *Woods v. Benyon*, 2 Cr. & J. 95; *Cobbold v. Caston*, 1 Bing. 899; 8 Moo. 466; *Astey v. Emery*, 4 M. & S. 262; *Harman v. Reeve*, 25 L. J. C. P. 257; 18 C. B. 586; *Irvine v. Stone*, 6 Cush. 508; *McMullen v. Riley*, 6 Gray, 500.

<sup>3</sup> See *Harman v. Reeve*, 25 L. J. C. P. 257; 18 C. B. 586.

<sup>4</sup> *Irvine v. Stone*, 6 Cush. 508; *McMullen v. Riley*, 6 Gray, 506.

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the part of the vendor to agist them at his own expense until Michaelmas, and also to agist another mare and foal for the vendee, all for the sum of £30.

§ 62. **The conditions of validity under the statute of frauds.**—The statutes of frauds provide that contracts for the sale of goods, wares and merchandise shall not be allowed to be good, “except—

1. “the buyer shall accept part of the goods so sold, and actually receive the same;

2. “or give something in earnest to bind the bargain, or in part payment;

3. “or that some note or memorandum in writing of the said bargain be made and signed by the party to be charged by such contract or their agents thereunto lawfully authorized.”

These requirements will be discussed separately and consecutively.

§ 63. **Effect of compliance with requirement of acceptance and receipt—Limit as to time.**—When the buyer, in compliance with the statute, accepts and receives part of the goods sold, it must not be understood that the parties must have agreed to all the terms of the contract of sale. Inasmuch as this requirement refers only to the validity of the contract, and does not necessarily include a performance of it, there may be, in the statutory sense, an acceptance and receipt of the goods, or of a part of them, although there is a dispute between the parties as to the terms. And parol evidence is admissible to settle such a dispute.<sup>1</sup> Acceptance and receipt is as necessary to bind the seller, as it is to bind the buyer; nor can there be any acceptance and receipt, except with the assent of the seller.<sup>2</sup>

<sup>1</sup> Tomkinson v. Straight, 25 L. J. C. P. 85; s. c. 17 C. B. 697.

<sup>2</sup> Washington Ice Co. v. Webster, 62 Me. 341; Clark v. Tucker, 2 Sandf. 157.

It hardly needs to be stated that the acceptance and receipt are not required to follow the contract of sale within any given time. It matters not how long a time may have elapsed, provided these acts are done in pursuance of the contract.<sup>1</sup>

§ 64. **Proof and burden of proof, of acceptance and receipt.** — The burden of proving the facts of acceptance and receipt always rests upon the party alleging it, usually the plaintiff, whether he be the seller or buyer. Whoever is undertaking to enforce the contract of sale must prove the acceptance and receipt.<sup>2</sup> So, also, where a part of the goods has been accepted and receipted, the burden of proof is on the party alleging it to prove of what goods this was a part.<sup>3</sup> Ordinarily it is a question of fact for the jury, whether there has been an acceptance and receipt.<sup>4</sup> But when it appears, upon a consideration of all the facts of the case, that the evidence in proof of acceptance and receipt is not sufficient to warrant an affirmative finding, the court may take the case from the jury, and order a verdict in accordance with this conclusion.<sup>5</sup>

§ 65. **Acceptance and receipt by agent.** — It is not necessary that there should be a personal acceptance and

<sup>1</sup> *McKnight v. Dunlop*, 5 N. Y. 537; *Bush v. Holmes*, 53 Me. 417; *Richardson v. Squires*, 37 Vt. 640; *Amson v. Dreher*, 35 Wis. 615; *McCarthy v. Nash*, 14 Minn. 127; *Sprague v. Blake*, 20 Wend. 63; *Marsh v. Hyde*, 3 Gray, 331; *Davis v. Moore*, 13 Me. 424; *Buckingham v. Osborne* 44 Conn. 133; *Sale v. Darragh*, 2 Hilt. 184.

<sup>2</sup> *Denny v. Williams*, 5 Allen, 1; *Howard v. Borden*, 13 Allen, 299; *Quintard v. Bacon*, 99 Mass. 185; *Remick v. Sandford*, 120 Mass. 309; *Shepherd v. Pressey*, 32 N. H. 49; *Prescott v. Locke*, 51 N. H. 94; *Young v. Blaisdell*, 60 Me. 272.

<sup>3</sup> *Marsh v. Hyde*, 3 Gray, 331; *Davis v. Eastman*, 1 Allen, 422; *Bowers v. Anderson*, 49 Ga. 143.

<sup>4</sup> *Garfield v. Paris*, 96 U. S. 563.

<sup>5</sup> *Stone v. Browning*, 68 N. Y. 598; *Kealey v. Tennant*, 13 Ir. C. L. 394; *Denny v. Williams*, 5 Allen, 5; *Howard v. Borden*, 13 Allen, 299; *Clark v. Marriott*, 9 Gill, 331.



receipt. A duly authorized agent may accept and receive for his principal, and this would be a sufficient compliance with the statute.<sup>1</sup> But the agent must be authorized, either expressly or by implication. And an agent may be authorized to receive for the principal, without having any authority to accept in his name. Thus, while the common carrier, to whom the goods are delivered for shipment to the purchaser, is an impliedly authorized agent of the vendee to receive the goods for his principal, he cannot bind the vendee by his acceptance. The common carrier's reception of the goods is not in any sense an acceptance by the vendee, in order to satisfy the requirement of the statute;<sup>2</sup> not even when the common carrier has been expressly selected by the vendee. At least, that appears to be the better rule.<sup>3</sup> No authority need be cited to show that a delivery of unordered goods to the common carrier does not amount even to a reception of them, in the statutory sense.

§ 66. **Acceptance and receipt distinguished.** — Although some of the authorities have manifested a disposition to

<sup>1</sup> *Snow v. Warner*, 10 Met. 132; *Dean v. Tallman*, 105 Mass. 443; *Ontwater v. Dodge*, 6 Wend. 397; *Barkley v. Rensselaer R. R. Co.*, 71 N. Y. 205; *Jones v. Mechanics' Bank*, 29 Md. 287; *Daws v. Montgomery*, 5 Roberts, 445.

<sup>2</sup> *Cross v. O'Donnell*, 44 N. Y. 661; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. 115; *Rogers v. Phillips*, 40 N. Y. 519; *Grimes v. Van Fecten*, 20 Mich. 410; *Loyd v. Wight*, 30 Ga. 578; *Denmead v. Glass*, 30 Ga. 637; *Atherton v. Newhall*, 123 Mass. 141; *Astey v. Emery*, 4 M. & S. 262; *Johnson v. Dodgson*, 2 M. & W. 656; *Hunt v. Hecht*, 8 Ex. 814; *Meredith v. Meigh*, 2 E. & B. 370; *s. c.* 22 L. J. Q. B. 401; *Hart v. Bush*, E. B. & E. 494; 27 L. J. Q. 271; *Smith v. Hudson*, 6 B. & S. 481; 34 L. J. Q. B. 145; *Hanson v. Armitage*, 5 B. & Ald. 557; *Norman v. Phillips*, 14 M. & W. 276; *Acebal v. Levy*, 10 Bing. 376; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Maxwell v. Brown*, 39 Me. 98; *Hausman v. Nye*, 62 Ind. 485; *Daly v. Neacks*, *Berton* (N. B.) 346.

<sup>3</sup> *Johnson v. Cuttle*, 105 Mass. 447; *Allard v. Greasert*, 61 N. Y. 1; *Jones v. Mechanics' Bank*, 29 Md. 287. But see *Spencer v. Hale*, 30 Vt. 314; *Strong v. Dodds*, 47 Vt. 348.

ignore all distinctions between acceptance and receipt of goods,<sup>1</sup> it is now well established by the authorities that there is such a distinction, and the authorities are numerous, in which the acts have been held to constitute an acceptance and not a receipt, and *vice versa*.<sup>2</sup> The acceptance is a mental operation, which involves a present determination to assume the proprietorship over the goods, while the actual receipt of the goods involves taking possession of them, either personally or through one's agent. There may, therefore, be an acceptance without a receipt, as where the goods have been inspected and selected by the buyer, and the contract of sale made, but the goods are still in the possession of the seller;<sup>3</sup> and, so, also, there may be a receipt of the goods, without an acceptance, where the goods are taken into possession by the buyer, with the intention of examining the goods, before concluding to accept. And he is not bound to accept, where he has received the goods, simply because the goods are in every respect in accordance with the contract.<sup>4</sup> The two things, acceptance and receipt, are, therefore, entirely distinct and separable. Nor need they occur simultaneously. An acceptance may take place prior as well as subsequent to the receipt of the goods.<sup>5</sup>

<sup>1</sup> *Castle v. Sworder*, 6 H. & N. 332; 30 L. J. Ex. 310; *Marvin v. Wallace*, 6 E. & B. 726; 25 L. J. Q. B. 369.

<sup>2</sup> *Phillips v. Bistolli*, 2 B. & C. 511; *Clinitz v. Surrey*, 5 Esp. 267; *Smith v. Hudson*, 5 B. & S. 431; 34 L. J. Q. B. 145; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261. See, also, cases cited in preceding note, of effect of reception of goods by a common carrier.

<sup>3</sup> *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Saunders v. Topp*, 4 Ex. 390.

<sup>4</sup> *Stone v. Browning*, 51 N. Y. 211; 68 N. Y. 598; *Brewster v. Taylor*, 63 N. Y. 587; *Remick v. Sandford*, 120 Mass. 309; *Bacon v. Eccles*, 43 Wis. 227; *Gibbs v. Benjamin*, 45 Vt. 124; *Hewes v. Jordan*, 39 Md. 472.

<sup>5</sup> *Cross v. O'Donnell*, 44 N. Y. 661. In *re Downing*, 2 Low. 563; *U. S. Reflector Co. v. Rushton*, 7 Daly, 410; *Hewes v. Jordan*, 39 Md. 484; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97; *Saunders v. Topp*, 4 Ex. 390; *Hunt v. Hecht*, 8 Ex. 814; 22 L. J. Ex. 293. But the acceptance must

§ 67. **What acts constitute acceptance.**—Since the acceptance is itself a mental operation, it must be manifested or communicated to others in some way, in order that it may become a legal fact. The law can only take cognizance of mental operations which have been published to the world or to the parties interested. Of course, a declaration that the buyer accepts or will take the goods, would be sufficient. But in the cases in which the question is raised, there is ordinarily no such explicit declaration, and if acceptance is to be proved at all, it can only be by the actions of the buyer, or by collateral facts, which are inconsistent with the absence of an intention to accept; wherever the buyer has done anything with or concerning the goods, which would involve the exercise of ownership over them, such as a resale of them,<sup>1</sup> a change in the condition or character of them,<sup>2</sup> making use of them,<sup>3</sup> and the like. As it has been expressed by an English judge, “if the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them.”<sup>4</sup> But wherever the facts do not show an exercise of ownership over the goods, as a general rule, the acceptance cannot be established, although there has been a receipt of the goods.<sup>5</sup> It has also been held that a mere

precede the bringing of the action. *Bill v. Bament*, 9 M. & W. 36; *Fricker v. Tomlinson*, 1 M. & G. 772.

<sup>1</sup> *Chaplin v. Rogers*, 1 East, 195; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Lillywhite v. Devereaux*, 15 M. & W. 285; *Baines v. Jevons*, 7 C. & P. 288; *Hill v. McDonald*, 17 Wis. 97; *Marshall v. Ferguson*, 28 Cal. 65; *Robinson v. Gordon*, 28 Up. Can. Q. B. 143; *Phillips v. Ocmulgee Mills*, 55 Ga. 633.

<sup>2</sup> *Parker v. Wallis*, 5 E. & B. 21. See *Maberley v. Sheppard*, 10 Bing. 99.

<sup>3</sup> *Beaumont v. Brengerie*, 5 C. & B. 301.

<sup>4</sup> *Erle, J.*, in *Parker v. Wallis*, 5 E. & B. 21. See, also, to the same effect, *Gray v. Davis*, 10 N. Y. 285; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200; *Dallard v. Botts*, 6 Allen (N. B.), 443; *Pinkham v. Mattox*, 53 N. H. 606.

<sup>5</sup> *Kent v. Huskinson*, 3 B. & P. 233; *Maberley v. Sheppard*, 10 Bing.

*effort to resell* the goods does not necessarily prove an acceptance, since the parties may have expected to accept only in case they could make a resale.<sup>1</sup>

Where the buyer has had an opportunity to inspect the goods, and indicates by marking or otherwise what goods he will take, it is held that the facts show an acceptance.<sup>2</sup> And an acceptance is also proven, where the goods have been marked and set aside by the vendor, with the consent, or by the direction of the purchaser.<sup>3</sup> It has also been held that the receipt of the goods, in pursuance of an order for the same, and their retention for an unreasonable time, are facts sufficient to support the presumption of an acceptance.<sup>4</sup>

§ 68. **Whether inspection of goods is necessary to constitute acceptance — Conditional acceptances.** — But it has been a much mooted question in England, whether there can be an acceptance, where there has been no opportunity to inspect the goods, and the buyer consequently reserves

99; *Curtis v. Pugh*, 10 Q. B. 111. This last case is, however, not reliable, there being facts sufficient to prove an exercise of ownership over the goods.

<sup>1</sup> *Clark v. Noble*, 2 Up. Can. Q. B. 361; *Walker v. Boulton*, 3 Up. Can. Q. B. (o. s.) 252; *Gorham v. Fisher*, 30 Vt. 431; *Jones v. Mechanics' Bank*, 29 Md. 297. But see *Blenkinsop v. Clayton*, 7 Taunt. 597.

<sup>2</sup> *Cusick v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Saunders v. Topp*, 4 Ex. 390. But the specific goods must be selected. *Nicholson v. Bower*, 1 E. & E. 172; 28 L. J. Q. B. 97.

<sup>3</sup> *Bill v. Bament*, 9 M. & W. 86; *Proctor v. Jones*, 2 C. & P. 532; *Boulter v. Arnott*, 1 C. & M. 334; *Baldey v. Parker*, 2 B. & C. 87; *Hodgson v. LeBret*, 1 Camp. 233. But see *Chitty on Contracts*, p. 375, where it is held that, "in no case can the marking of goods with the name of the purchaser by his consent, constitute an acceptance within the act unless it appear from the evidence that the goods have been delivered to the purchaser." Certainly the delivery and receipt of the goods is essential to the validity of the contract, but it is the previous selection of the goods, which constitutes the acceptance required by the statute.

<sup>4</sup> *Bushel v. Wheeler*, 15 Q. B. 442; *Norman v. Phillips*, 14 M. & W. 277. See *Nichols v. Plume*, 1 C. & P. 272. See *post*, § 114.

the right to reject the goods upon inspection. According to some of the authorities, this is a conditional acceptance, and the buyer cannot afterwards repudiate the contract, except upon the ground that the goods delivered do not comply with the terms of the contract.<sup>1</sup> But there are other cases, in which it was held that there can be no sufficient acceptance, as long as the right of rejection has not been waived.<sup>2</sup>

<sup>1</sup> *Morton v. Tibbetts*, 15 Q. B. 428; 19 L. J. Q. B. 382, Lord Campbell saying: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured or examined. As the act of Parliament expressly makes the acceptance and actual receipt of any part of the goods sold insufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the residue; and even when the sale is by sample, that the residue offered does not correspond with the sample. \* \* \* We are of opinion that there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled." In this case, defendant had ordered goods by parol, to be of a certain weight, and according to sample. Before their arrival, defendant resold the goods on the same conditions. See, to the same effect, *Currie v. Anderson*, 2 E. & E. 592; 29 L. J. Q. B. 87; *Kibble v. Gough*, 88 L. T. (N. S.) 204, Brett, Lord J.: "There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made, except on admission of the contract, and that the goods were sent under it. I am of opinion that there was a sufficient acceptance under the statute of frauds, although there was still a power of rejection."

<sup>2</sup> *Hunt v. Hecht*, 8 Ex. 814; 22 L. J. Ex. 298, Martin, B.: "There are various authorities to show that for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the articles sent. *Morton v. Tibbetts* has been cited as an authority to the contrary, but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court, indeed, there say

The latter ruling seems to be generally accepted in the United States.<sup>1</sup>

It seems to me that the two opposing theories are both partly erroneous. The opportunity to inspect the goods is not, or ought not to be, considered essential to the acceptance, where there has been a formal acceptance, or where the other attending facts indicate very clearly an assumption of ownership over the goods. It does not seem to be impossible for the parties to make an acceptance, which would be sufficient to comply with this statutory requirement, conditional upon the right of rejection, if the goods, upon inspection, do not satisfy the terms of the contract. If that were impossible, then nothing but an absolute acceptance would be sufficient. On the other hand, the want of an opportunity to examine the goods, and the absence of any waiver of the right of rejection on inspection, would be strong evidence of a want of acceptance, which could be rebutted only by the strongest proof of the buyer's exercise of ownership over the goods.

There may be an exercise of ownership over the goods through the disposition of the bill of lading, as by the control of the goods themselves.<sup>2</sup>

that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But, in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt, it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection." See, to same effect, *Coombs v. Bristol & Exeter R. B. Co.*, 3 H. & N. 510; 27 L. J. Ex. 401; *Smith v. Hudson*, 6 B. & S. 481; 84 L. J. Q. B. 145.

<sup>1</sup> *Russell v. Minor*, 22 Wend. 659; *Rathbun v. Rathbun*, 6 Barb. 98; *Brand v. Fetch*, 3 Keyes, 409; *Shepherd v. Pressey*, 82 N. H. 49; *Messer v. Woodman*, 22 N. H. 181, 182; *Belt v. Marriott*, 9 Gill, 331; *Gilman v. Hill*, 36 N. H. 811; *Clark v. Tucker*, 2 Sandf. 157; *Gorham v. Fisher*, 30 Vt. 428.

<sup>2</sup> *Currie v. Anderson*, 29 L. J. Q. B. 87; s. c. 2 E. & E. 592; *Meredith v. Meigh*, 22 L. J. Q. B. 401; s. c. 2 E. & B. 364.

§ 69. What constitutes a receipt of the goods. — The cases in which this question can arise have been divided by Mr. Benjamin<sup>1</sup> into three classes, viz. : where the goods are at the time of sale in the possession,

“ 1. of the buyer as bailee or agent of the vendor;

“ 2. of a third person, whether or not as bailee or agent of the vendor;

“ 3. of the vendor himself.”

When the goods are already in the possession of the vendee as bailee of the vendor, there can be no actual taking hold of the goods in receipt of them; for the vendee already has hold of them, although in a different character. In the performance of the contract of sale, the only thing to be done is to change the character of his possession from that of bailee to that of owner of the goods. Whatever, therefore, would amount to a change in the character of the possession would be a sufficient receipt as well as an acceptance. Under these circumstances, the receipt is implied from the proof of acceptance. Whenever, therefore, the vendee in possession does with the goods, what would be consistent only with his assumption of ownership, there is sufficient proof of acceptance and receipt.<sup>2</sup>

Where the goods are in the possession of a third person as bailee or agent of the vendor, there will be a sufficient receipt of the goods by the vendee, if in consequence of the agreement of the vendor and vendee, and with consent of, or at least notice to, the bailee, the control of the goods passes to the vendee. Under these circumstances, the third person becomes the bailee of the vendee, in the place of the vendor. But in order that there may be a sufficient receipt, it is held that the bailee must know of the agreement for the transfer of control. The agreement does not amount

<sup>1</sup> Benjamin on Sales, § 172.

<sup>2</sup> Edan v. Dudfield, 1 Q. B. 306; Lillywhite v. Devereux, 15 M. & W. 285.

to a receipt, if the bailee does not expressly or impliedly agree to hold the goods for the vendee. And this consent or knowledge of the bailee is required, in order to constitute a receipt, although the bailee is bound by law or by his own agreement to deliver the goods to the vendor's assignee or order. In referring to this obligation of the bailee, the court in *Bentall v. Burn*,<sup>1</sup> say: "This may be true, and they (the warehousemen) might render themselves liable to an action for refusing to do so; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."<sup>2</sup> But if the bailee is not authorized to deliver, as where the goods are in a government warehouse, awaiting the payment of duties, any agreement of the warehouseman to deliver the goods to the vendee, without payment of the duties, will not amount to a receipt.<sup>3</sup>

The usual case is where the goods at the time of sale are in possession of the vendor. And, ordinarily, nothing short of a transfer of possession from the vendor to the vendee, or his agent, will amount to a sufficient receipt. But that is not always required. It frequently occurs, that the vendor will, after a completion of the sale, agree with the vendee, that he will retain possession in the capacity of

<sup>1</sup> 3 B. & C. 423.

<sup>2</sup> See, also, to the same effect, *Boardman v. Spooner*, 13 Allen, 353; *Burge v. Cone*, 6 Allen, 412; *Clark v. Tucker*, 2 Sandf. 157; *Bassett v. Camp*, 54 Vt. 232; *King v. Jarman*, 35 Ark. 190; *Farina v. Home*, 16 M. & W. 119; *Godts v. Rose*, 17 C. B. 229; 25 L. J. C. P. 61; *Lackington v. Atherton*, 7 M. & G. 360; *Lucas v. Dorrien*, 7 Taunt. 278; *Harman v. Anderson*, 2 Camp. 243; *Bill v. Bament*, 9 M. & W. 36; *Woodley v. Coventry*, 2 H. & C. 164; 32 L. J. Ex. 185. See, also, to the same effect, in respect to what constitutes delivery to the vendee, *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 374; *Bullard v. Waite*, 16 Gray, 55; *Linton v. Butz*, 7 Pa. St. 89; *Hatch v. Bayley*, 12 Cush. 29; *Barney v. Brown*, 2 Vt. 374; *Gibson v. Stevens*, 8 How. 384; *Warren v. Milliken*, 57 Me. 97.

<sup>3</sup> *In re Clifford*, 2 Sawy. 428. But see *Dunham v. Pettee*, 1 Daly, 211.



§ 70 STATUTE OF FRAUDS, IN RESPECT TO SALES. [CH. VI.]

a bailee. The most notable example is where the proprietor of a livery stable sells a horse, and agrees to board and lodge the horse at his stable for the vendee. In such a case, there is a sufficient acceptance and receipt, although there is no actual transfer of possession. But, in all such cases, any retention by the vendor of the vendor's lien, or other control over the goods in the character of vendor, will prevent the proof of a receipt of the goods, sufficient to satisfy the requirements of the statute.<sup>1</sup> And it has been held that the non-payment of the price is *prima facie* evidence of the retention of the lien.<sup>2</sup>

§ 70. Acceptance and receipt of part of the goods — Samples. — The statute also provides that the acceptance and receipt of a part of the goods will be sufficient to take the entire contract out of the statute. And this has been held to be the case, even though a portion of the goods is yet to be manufactured, and is not delivered for some time after the acceptance and receipt of the part.<sup>3</sup> Even the destruc-

<sup>1</sup> Knight v. Mann, 118 Mass. 443; Safford v. McDonough, 120 Mass. 290; Rodgers v. Jones, 129 Mass. 422; Messer v. Woodman, 22 N. H. 182; Kirby v. Johnson, 23 Mo. 354; Edwards v. Grand Trunk R. R. Co., 54 Me. 105; Marsh v. Rouse, 44 N. Y. 643; Dale v. Stimpson, 21 Pick. 384; Chaplin v. Rogers, 1 East, 195; Elmore v. Stone, 1 Taunt. 458; Marvin v. Wallis, 6 E. & B. 726; 25 L. J. Q. B. 369; Beaumont v. Beeverger, 5 C. B. 301; Cusack v. Robinson, 30 L. J. Q. B. 264; 1 B. & S. 299; Saunders v. Topp, 4 Ex. 394; Baldey v. Parker, 2 B. & C. 37; Dodsley v. Varley, 12 Ad. & E. 632; Howe v. Palmer, 3 B. & Ald. 321; Smith v. Surman, 9 B. & C. 561; Phillips v. Bistall, 2 B. & C. 511; Hawes v. Watson, 2 B. & C. 540; Bill v. Bament, 9 M. & W. 37; Maberley v. Sheppard, 10 Bing. 101; Holmes v. Hoskins, 9 Ex. 753; Castle v. Sworden, 29 L. J. Ex. 285; 30 L. J. Ex. 310; Weld v. Came, 98 Mass. 152; Janvin v. Maxwell, 28 Wis. 51; Means v. Williamson, 37 Me. 556; Ross v. Welch, 11 Gray, 236; Rappleye v. Adeo, 65 Barb. 589; Green v. Merriam, 28 Vt. 301; Jackson v. Watts, 1 McCord, 288; Barrett v. Goddard, 3 Mason, 107.

<sup>2</sup> Tempest v. Fitzgerald, 3 B. & Ald. 680; Carter v. Toussaint, 5 B. & Ald. 855.

<sup>3</sup> Scott v. Eastern Counties R. R. Co., 12 M. & W. 33; Elliott v. Thomas, 3 M. & W. 176; Thompson v. Macaroni, 3 B. & C. 1; Bigg v.

tion of the balance of the goods by fire, while they were in the possession of the vendor, will not affect the validity of the contract.<sup>1</sup> But the part must be received as a part of the whole, and with the implied, if not expressed, intention of accepting the whole. And if the part is received with an express repudiation of the balance, it will not be sufficient to bind the buyer to take the rest of the goods.<sup>2</sup> It is for this reason, that the acceptance and receipt of the sample by which the sale was made, will not constitute an acceptance and receipt of a part of the goods, unless the sample is actually accepted and received as a part of the goods, and to be included in the measurement or weight of the goods sold.<sup>3</sup>

It may be stated that the acceptance and receipt of a part of the goods binds both parties to the whole bargain, even though a part of the bargain be that the vendor shall purchase the goods in a given contingency.<sup>4</sup>

Whiskin, 14 C. B. 195; Gault v. Brown, 48 N. H. 183; Farmer v. Gray, 18 Neb. 401; Rickey v. Tenbrock, 63 Mo. 563.

<sup>1</sup> Townsend v. Hargrave, 118 Mass. 325.

<sup>2</sup> Atherton v. Newhall, 128 Mass. 141. See, also, Pratt v. Chase, 40 Me. 269; Gilliat v. Roberts, 19 L. J. Ex. 410; Simpson v. Krumdick, 28 Minn. 352.

<sup>3</sup> Carver v. Lane, 4 E. D. Smith, 168; Gardner v. Grout, 2 C. B. (N. S.) 340; Klinitz v. Surrey, 5 Esp. 267; Talver v. West, Holt, 178; Cooper v. Elston, 7 T. R. 14; Foster v. Trampton, 6 B. & C. 107; Hinde v. Whitehouse, 7 East, 558, Lord Ellenborough saying: "Inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically if he should choose to have the commodity weighed, I cannot but consider it as a part of the goods sold under the terms of the sale, accepted and received as such by the buyer. And although it be delivered partly *alio intuito*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly.

<sup>4</sup> Fay v. Wheeler, 44 Vt. 292; Rankins v. Grube, 36 Hun, 481; Hagar v. King, 38 Barb. 200.

§ 71 STATUTE OF FRAUDS, IN RESPECT TO SALES. [CH. VI.]

§ 71. **Earnest or part payment.** — The statute provides that the contract of sale will be allowed to be good, if the buyer “give something in earnest to bind the bargain, or in part payment.” The doctrine of earnest was drawn by the common-law writers from the Roman law, as a means of binding or concluding the bargain, and the statute of frauds simply adopted it, and applied it to the purpose of the statute.<sup>1</sup> It is to be distinguished from part payment in that what is given in earnest is never taken as a part of the consideration, whereas part payment is always a part of the consideration. The subject is not much discussed in the cases and books, since it is not customary to give anything in earnest. But it is settled, however, that in order that there may be a giving in earnest, the thing must be transferred absolutely. If it is returned to the vendee, either immediately or subsequently on performance of the contract, it is not earnest and is not sufficient to bind the bargain.<sup>2</sup> It must be something of intrinsic value, something more than the vendee’s promise to pay. His check would not be sufficient.<sup>3</sup>

In regard to what will constitute a part payment, sufficient to take the case out of the statute, it may be stated in the first place that something of value must be given, but it need not be money.<sup>4</sup> A mere promise to pay will not be sufficient.<sup>5</sup> Nor will a simple tender of part payment be sufficient. The part payment must be accepted by the vendor. If he rejects it, the tender will not serve to bind the bargain.<sup>6</sup>

A release of the vendor from his indebtedness to the vendee

<sup>1</sup> Bracton, 145; Glanville, ch. XIV.

<sup>2</sup> *Blenkinsop v. Clayton*, 7 Taunt. 597; *Goodall v. Skelton*, 2 H. Bl. 316; *Howe v. Hayward*, 108 Mass. 54.

<sup>3</sup> *Noakes v. Morey*, 30 Ind. 103.

<sup>4</sup> *Dow v. Worthen*, 37 Vt. 108; *Combs v. Bateman*, 10 Barb. 573; *Hunter v. Wetsell*, 17 Hun, 135; *White v. Drew*, 56 How. Pr. 57.

<sup>5</sup> *Artcher v. Zeb*, 5 Hill, 205; *Krohn v. Bantz*, 68 Ind. 277.

<sup>6</sup> *Edgerton v. Hodge*, 41 Vt. 676; *Hicks v. Cleveland*, 48 N. Y. 84; *Walrath v. Ingles*, 64 Barb. 265.

or to some third person, in part payment of the price of the goods, will operate to take the case out of the statute, if the release is provided for by some collateral agreement, whether oral or written, and particularly when a written receipt for the debt is given.<sup>1</sup> But if the agreement to release the vendor's indebtedness in part payment of the price of the goods is itself a part of the contract of sale, it will not be considered such a part payment as will take the case out of the statute.<sup>2</sup>

In most of the States it does not matter at what time the part payment is made, as long as it is made before the bringing of the action.<sup>3</sup> But in New York it is held that the part payment must be made at the time of the contract, in order to take it out of the statute.<sup>4</sup> But this rule is satisfied, if at the time of the subsequent part payment, the original contract should be substantially renewed.<sup>5</sup>

<sup>1</sup> *Brady v. Harrahy*, 21 Up. Can. Q. B. 340; *Furniss v. Sawens*, 3 Up. Can. Q. B. 77; *Cotterill v. Stevens*, 10 Wis. 442; *Paine v. Fulton*, 34 Wis. 83. But a mere promise to pay or release the vendor's indebtedness will not be sufficient. *Artcher v. Zeb*, 5 Hill, 395; *Ely v. Ormsby*, 12 Barb. 570; *Brand v. Brand*, 49 Barb. 346; *Brabin v. Hyde*, 32 N. Y. 519; *Walrath v. Richie*, 5 Laws. 362; *Teed v. Teed*, 44 Barb. 96.

<sup>2</sup> *Walker v. Nussey*, 16 M. & W. 302, Parke, B.: "Had there been a bargain to sell the leather at a certain price and subsequently an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part payment, then or subsequently."

<sup>3</sup> *Thompson v. Alger*, 12 Met. 435; *Gault v. Brown*, 48 N. H. 139; *Davis v. Moore*, 13 Me. 424.

<sup>4</sup> *Artcher v. Zeb*, 5 Hill, 205; *Ely v. Ormsby*, 12 Barb. 570; *Bissell v. Bascomb*, 39 N. Y. 275; *Allis v. Read*, 45 N. Y. 142. It will be a part payment "at the time," if a check is given immediately and subsequently paid on presentation at the bank. *Hunter v. Wetsell*, 84 N. Y. 549.

<sup>5</sup> *Hunter v. Wetsell*, 57 N. Y. 375; 84 N. Y. 544; *Jackson v. Tupper*, 30 Hun, 220; *Webster v. Zielly*, 52 Barb. 482.

§ 73 STATUTE OF FRAUDS, IN RESPECT TO SALES. [CH. VI.]

§ 72. **Memorandum or note in writing required—Time of Execution.** — The last condition of validity provided by the statute is “that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto duly authorized.” It is to be observed that the statute does not require the contract of sale to be in writing, only that a memorandum or note in writing be made of the bargain. Hence, it will not be necessary for the memorandum to be made at the same time as the contract. It does not matter how much time elapses between the making of the contract and the execution of the memorandum, except that it is held, that the memorandum must be made before the action is brought,<sup>1</sup> although it would seem rational to hold that it may be made even after suit is brought, as long as the trial has not been had.<sup>2</sup> The action is not brought on the memorandum, but on the oral contract, which is only to be proven by the memorandum or note in writing.

§ 73. **By whom should note be made—Undisclosed principal.** — The note may of course be made by the agents who are entrusted with the transaction. The grant of authority to buy or sell for the principal implies an authority to complete the bargain and bind the parties by the execution of a memorandum. And the agent may make the memorandum, even after the express or principal agency is already terminated. The authority to bind the principal by the execution of a memorandum would survive.<sup>3</sup>

It is not necessary, in order to bind the principal, that the memorandum should be executed in his name. As long as his name is not disclosed to the other party at the time when, or before the contract or memorandum has made, the other party has his election, on the discovery of the real

<sup>1</sup> *Bill v. Bament*, 9 M. & W. 86; *Bird v. Munroe*, 66 Me. 347.

<sup>2</sup> See Benjamin on Sales, Bennett's Notes (ed. 1888), pp. 199, 200.

<sup>3</sup> *Williams v. Bacon*, 2 Gray, 387.

principal, whom to hold liable, the real principal, or the agent who appears on the face of the memorandum to be the principal.<sup>1</sup> Although parol evidence is not admissible to relieve the agent of liability on a contract of sale, in which the real principal is not disclosed,<sup>2</sup> yet it can be proven by parol who the real principal is, in order to hold him liable on the contract, if the other party should so elect. This is held to be no violation of the statute of frauds, on the ground that this parol evidence "does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal."<sup>3</sup>

How the agent should sign in order to bind the principal is a question belonging to the law of agency; and it has been sufficiently explained in works on contracts and

<sup>1</sup> *Truman v. Loder*, 11 A. & E. 587; *Higgins v. Senior*, 8 M. & W. 834; *Humfrey v. Dale*, 7 E. & B. 266; E. B. & E. 1004; 26 L. J. Q. B. 137; 27 L. J. Q. B. 390; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchison v. Tatham*, L. R. 8 C. P. 482; *Short v. Spakeman*, 2 B. & Ad. 962; *Jones v. Littledale*, 6 A. & E. 486; *Reid v. Draper*, 6 H. & N. 813; 30 L. J. Ex. 268; *Palce v. Walker*, L. R. 5 Ex. 173; *Gowen v. Klous*, 101 Mass. 449; *Wiener v. Whipple*, 53 Wis. 302; *Williams v. Bacon*, 2 Gray, 387; *Hunter v. Gidding*, 97 Mass. 41; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *Lerned v. Johns*, 9 Allen, 419; *Dykers v. Townsend*, 24 N. Y. 61.

<sup>2</sup> *Higgins v. Senior*, 8 M. & W. 834, and cases cited *supra*.

<sup>3</sup> *Higgins v. Senior*, 8 M. & W. 834, Parke, B.; *Truman v. Loder*, 11 A. & E. 587: "Among the ingenious arguments pressed by the defendants' counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

§ 75 STATUTE OF FRAUDS, IN RESPECT TO SALES. [CH. VI.

agency, to justify the author in presuming that the reader is fully acquainted with its correct answer, and in dismissing the subject without further explanation.

§ 74. **To whom the note should be addressed.** — It does not matter to whom, if at all, the note or memorandum is addressed. It may be addressed to a third person,<sup>1</sup> to the defendant's own agent,<sup>2</sup> and it need not be communicated to any one at all, it consisting of any entry on the defendant's books.<sup>3</sup>

§ 75. **The form of the memorandum — Separate pieces of paper.** — The memorandum may assume any form, provided the contents are ample. It may be made in a letter or letters,<sup>4</sup> or it may consist of entries in commercial books of account,<sup>5</sup> or of a subscription list.<sup>6</sup> Nor is it necessary that the memorandum should be made for the express purpose of authenticating the contract. It is sufficient, if it furnishes written evidence of all the terms of the contract, whatever may be the purpose of its composition.<sup>7</sup>

<sup>1</sup> *Moore v. Mountcastle*, 61 Mo. 424; *Sugden on Vendors*, p. 139, § 39; *Moore v. Hart*, 1 Vern. 110; *Ayliffe v. Tracy*, 2 P. Wms. 65; *Fugate v. Hanford*, 3 Litt. 262. But see *Buck v. Pickwell*, 1 Williams (Vt.), 167; *Clark v. Tucker*, 2 Sandf. 157; *Kinloch v. Savage*, 1 Speers Ch. 470.

<sup>2</sup> *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5; *Kleeman v. Collins*, 9 Bush, 467.

<sup>3</sup> *Peabody v. Soyars*, 56 N. Y. 230; *Argus Co. v. City of Albany*, 55 N. Y. 495; *Johnson v. Trinity Church*, 11 Allen, 123; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407.

<sup>4</sup> *Moore v. Mountcastle*, 61 Mo. 424; *Dobell v. Hutchinson*, 3 A. & E. 370; *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5; *Smith v. Surman*, 9 B. & C. 561; *Thayer v. Luce*, 22 Ohio St. 62.

<sup>5</sup> *Peabody v. Soyars*, 56 N. Y. 230; *Argus Co. v. City of Albany*, 55 N. Y. 495; *Johnson v. Trinity Church*, 11 Allen, 123; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Hinde v. Whitehouse*, 7 East, 558.

<sup>6</sup> *Boydell v. Drummond*, 11 East, 142. See, also, *Fitzmaurice v. Bailey*, 9 H. L. C. 78; *Crane v. Powell*, L. R. 4 C. P. 123.

<sup>7</sup> *Ellis v. Deadman*, 4 Bibb, 467; *Smith v. Arnold*, 5 Mason, 416; *Reeves v. Pye*, 1 Cranch C. C. 219.

It is also unimportant whether the entire memorandum is made at one time and on one paper, or parts be made at different times and on different pieces of paper. The memorandum may be made up of two or more separate notes, provided the notes together supply written evidence of all the ingredients of the contract.<sup>1</sup> But in order that the memorandum may be made up of two or more writings, either all must be signed,<sup>2</sup> or the separate papers must be brought into some sort of connection with each other. A physical attachment, by means of pins or of paper fasteners of all kinds, will be sufficient;<sup>3</sup> but this is not necessary, provided the signed paper contains some sort of reference to the other unsigned parts.<sup>4</sup> At one time it was supposed and held that the signed paper must have a distinct reference to other parts, so that these parts may be identified by the description; and that still seems to be the American rule.<sup>5</sup> But it seems now to be settled in England that the only thing

<sup>1</sup> *Peck v. Vandemark*, 99 N. Y. 29; *Jelks v. Barrett*, 52 Miss. 315; *Fisher v. Kuhn*, 54 Miss. 480; *Lerned v. Wannemacher*, 9 Allen, 412; *Rhoades v. Castner*, 12 Allen, 182; *Lee v. Mahony*, 9 Iowa, 844.

<sup>2</sup> *Thayer v. Luce*, 22 Ohio St. 62.

<sup>3</sup> *Tallman v. Franklin*, 14 N. Y. 584; *Benjamin on Sales*, § 222.

<sup>4</sup> *Hinde v. Whitehouse*, 7 East, 558; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Kenworthy v. Schofield*, 2 B. & C. 945; *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennett*, 3 Taunt. 169; *Cooper v. Smith*, 15 East, 103; *Jackson v. Lowe and Lyman*, 1 Bing. 9; *Haughton v. Morton*, 5 Ir. C. L. 329; *McMullen v. Helberg*, 4 L. R. Ir. 94; *Richards v. Portor*, 6 B. & C. 487; *Smith v. Surman*, 9 B. & C. 561; *Archer v. Baynes*, 5 Ex. 625; 20 L. J. Ex. 54; *Johnson v. Buck*, 85 N. J. L. 339; *Morton v. Dean*, 13 Met. 388; *Smith v. Jones*, 66 Ga. 338; *Freeport v. Bartol*, 3 Greenl. 840; *Ridgway v. Ingram*, 50 Ind. 148; *Beckwith v. Talbot*, 95 U. S. 289.

<sup>5</sup> *Peck v. North Staffordshire R. R. Co.*, 10 H. L. C. 472-569, Lord Westbury: "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing that, by force of the reference, the writing itself becomes part of the instrument it refers to." See, also, *Moale v. Buchanan*, 11 Gill & J. 322; *Frank v. Miller*, 38 Md. 461. Mr. Story says, § 272, that "no room must be left for doubt that they all refer to the same agreement; and, therefore, it should appear



required is that the signed part should indicate that part of the contract is to be found in some other paper or papers.<sup>1</sup> But it must be observed that the *signed* paper must refer to the *unsigned* paper; it is not sufficient or necessary that the *unsigned* paper should refer to the signed paper.<sup>2</sup>

If the communication refers to all the terms of the contract of sale, it will be a sufficient compliance with the requirements of the statute, although in the same communication, the writer repudiates the contract.<sup>3</sup>

Although it has not been so decided in any case, it would appear reasonable that the statutory requirement will be

from intrinsic evidence in the papers, that such is the fact." Citing in support of this proposition, *Boydell v. Drummond*, 11 East, 142; *Sandilands v. Marsh*, 2 B. & Ald. 680; *Tawney v. Crother*, 3 Bro. Ch. 320, note (a); *Coles v. Trecothick*, 9 Ves. 250; *Brettel v. Williams*, 4 Exch. 523; *Ida v. Stanton*, 15 Vt. 685; *Toomer v. Dawson*, Cheves, 68; *Fitzmaurice v. Bayley*, 9 H. L. C. 78; *Farwell v. Mather*, 10 Allen, 322; *Hazard v. Day*, 14 Allen, 494; *Stocker v. Partridge*, 2 Roberts, 193; *Boardman v. Spooner*, 13 Allen, 358; *Morton v. Dean*, 13 Met. 385.

<sup>1</sup> *Long v. Millar*, 4 C. P. D. 450, Thesiger, L. J.: "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway v. Wharton*; there 'instructions' were referred to: now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity." See, to same effect, in which the reference was to "instructions," *Ridgway v. Wharton*, 6 H. L. C. 238; "terms agreed upon," *Bauman v. James*, 3 Ch. 508; "purchase," *Long v. Millar*, *sup.*; *Shardlow v. Cotterell*, 18 Ch. D. 280; 20 Ch. D. 90 C. A.; "our arrangement," *Cave v. Hastings*, 7 Q. B.D.125.

<sup>2</sup> *Brown v. Whipple*, 58 N. H. 209; *Freeport v. Bartol*, 3 Greenl. 340; *Ridgway v. Ingram*, 50 Ind. 148; *Beckwith v. Talbot*, 95 U. S. 239; *Johnson v. Buck*, 35 N. J. L. 339; *Morton v. Dean*, 13 Met. 388; *Smith v. Jones*, 66 Ga. 338.

<sup>3</sup> *Bailey v. Sweeting*, 9 C. B. (n. s.) 848; *Forster v. Howland*, 7 H. & N. 107, *McLean v. Nicholl*, 7 H. & N. 1016; *Wilkinson v. Evans*, L. R. 1 C. P. 407. See, *contra*, *Richards v. Porter*, 6 B. & C. 437.

satisfied if the memorandum be written with pencil, instead of pen and ink.<sup>1</sup>

§ 76. **What the memorandum should contain—Parties, subject-matter, terms—Consideration, price.**—It may be stated generally, that the memorandum should contain every material part of the contract of sale, the names of the parties, the subject-matter of the sale, and the terms and conditions of the sale.

Both buyer and seller must be either named or described in the contract. It will not suffice to name or describe only the party to be charged by the contract.<sup>2</sup> It is sometimes said that the memorandum must show who the buyer is and who the seller is, distinguishing one from the other without the aid of parol evidence.<sup>3</sup> Yet memoranda have been held to satisfy the requirement of the statute of frauds, although there is nothing in the memorandum with which to distinguish the buyer from the seller, their names being given, without indicating directly or indirectly their exact relation to the contract.<sup>4</sup> But even where it is held that there must be a written distinction of one from the other, the slightest distinction is held to be sufficient.<sup>5</sup> But it

<sup>1</sup> See Benjamin on Sales, § 231; *Geary v. Phycic*, 5 B. & C. 234.

<sup>2</sup> *Grafton v. Cummings*, 99 U. S. 100; *Anderson v. Harold*, 10 Ohio, 399; *McElroy v. Leery*, 61 Md. 397; *Calkins v. Falk*, 38 How. Pr. 62; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Champion v. Plummer*, 3 B. & P. 252; *Allen v. Bennett*, 3 Taunt. 169; *Cooper v. Smith*, 15 East, 103; *Jacob v. Kirk*, 2 M. & R. 222; *Williams v. Lake*, 29 L. J. Q. B. 1; 2 E. & E. 349; *Sarl v. Bondillon*, 26 L. J. C. P. 73; 1 C. B. (N. S.) 188; *Vandenburgh v. Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201; *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

<sup>3</sup> *Balley v. Ogdens*, 3 Johns. 419; *Coddington v. Goddard*, 16 Gray, 443; *Sherburne v. Shaw*, 1 N. H. 157; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 458.

<sup>4</sup> *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 458; *Sanborn v. Flagler*, 9 Allen, 474; *Grafton v. Cummings*, 99 U. S. 111; *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

<sup>5</sup> *Butler v. Thompson*, 92 U. S. 412; *Newberry v. Wall*, 84 N. Y. 576;

seems that the names of both parties must appear as parties to the contract. If the name of one of the parties appears in the memorandum in some other way than as a party, as, for example, in the description of the goods, it will not be sufficient under the statute.<sup>1</sup>

It is not necessary that the name should be written in full. The initials will suffice, parol evidence being admissible to show whose initials they are.<sup>2</sup>

But, instead of the name or initials of the parties being given in the memorandum, the parties may be identified by a written description of them, referring to their connection with some relationship or office, and the like. If parol evidence can clearly show who is meant by the description, its general character will not be objectionable.<sup>3</sup>

It is manifestly requisite that the subject-matter of the sale should be distinctly described in the memorandum and any material mistake in the same will make the memorandum insufficient to satisfy the requirement of a writing.<sup>4</sup> But while the quantity and quality must in some way be

*Coate v. Terry*, 24 Up. Can. C. P. 571; *Coddington v. Goddard*, 16 Gray, 436; *Sanborn v. Flagler*, 9 Allen, 474.

<sup>1</sup> *Vandenburgh v. Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201. In that case, the memorandum was as follows: "D. Spooner, agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at the Lyme Cobb, at 1s. per foot." The name of the seller only appears in the description of the marble. Held to be insufficient.

<sup>2</sup> *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *Grafton v. Cummings*, 99 U. S. 111; *Newell v. Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1; *Sanborn v. Flagler*, 9 Allen, 474.

<sup>3</sup> "Proprietor," *Sale v. Lambert*, 18 Eq. 1; *Rossiter v. Miller*, 46 L. J. Ch. 228; 5 Ch. D. 648, C. A.; s. c. 3 App. Cas. 1124; "Vendors," *Commins v. Scott*, 20 Ex. 11; "A trustee selling under a trust for sale," *Catling v. King*, 5 Ch. D. 660, C. A. But "vendor" was held to be insufficient in *Potter v. Duffield*, 18 Eq. 4. See, also, *Thomas v. Brown*, 1 Q. B. D. 714.

<sup>4</sup> *Sarl v. Bourdillon*, 26 L. J. C. P. 78; 1 C. B. (N. S.) 188; *Thornton v. Kempster*, 5 Taunt. 786; *May v. Ward*, 134 Mass. 127; *McElroy v. Buck*, 85 Mich. 434; *Waterman v. Meigs*, 4 Cush. 497.

described in the memorandum,<sup>1</sup> yet the exact weight need not always be given, as where the memorandum indicated a sale of "39 bales of cotton, at 40 cents."<sup>2</sup>

It has always been a much mooted question, whether the statute of frauds required a statement in writing of the consideration. The English courts have distinguished between the operation of the fourth and seventeenth sections of the statute, maintaining that the fourth section requires written evidence of the consideration to make a complete statement of the *agreement*,<sup>3</sup> while the seventeenth section, referring to *bargains* instead of *agreements*, is satisfied without a statement of the consideration, with the limitation to be mentioned, the courts holding that there was a sufficient difference in the meaning of the terms *agreement* and *bargain* to justify the distinction as to the effect of the two sections.<sup>4</sup> But the statement in writing of the consideration of the contract of sale is waived only when the parties have not agreed upon a fixed price for the goods, and where the ascertainment of the price is left to a determination of the market price or value of the goods. Where the price is agreed upon, it should be stated in the memorandum, and its omission will be fatal to the validity of the contract.<sup>5</sup>

<sup>1</sup> See cases cited in preceding note.

<sup>2</sup> Penniman v. Hartshorn, 13 Mass. 87.

<sup>3</sup> Wain v. Warlters, 5 East, 107; Saunders v. Wakefield, 4 B. & Ald. 595; Jenkins v. Reynolds, 3 B. & B. 14; Morley v. Boothby, 3 Bing. 107; Fitzmaurice v. Bayley, 9 H. L. C. 79.

<sup>4</sup> Laythoorn v. Bryant, 2 Bing N. C. 735, Tindall, C. J.: "Wain v. Warlters was decided on the express ground that an agreement under the fourth section imports more than a bargain under the seventeenth."

<sup>5</sup> Ide v. Stanton, 15 Vt. 685; Phelps v. Stillings, 60 N. H. 505; Kinloch v. Savage, Speer Eq. 472; Soles v. Hickman, 20 Pa. St. 180; O'Neil v. Crane, 67 Mo. 250; Smith v. Arnold, 5 Mason, 416; Ashcroft v. Butterworth, 136 Mass. 511; Adams v. McMillan, 7 Port. 73; Argus Co. v. Albany, 55 N. Y. 495; Norton v. Gale, 95 Ill. 538; Packard v. Richardson, 17 Mass. 122; Levy v. Merrill, 4 Greenl. 180; Sage v. Wilcox, 6 Conn. 81; Miller v. Irvine, 1 Dev. & Bat. 103; Violet v. Patton, 5 Cranch, 142; Taylor v. Ross, 3 Yerg. 330; Acebal v. Levy, 10 Bing. 383; Elmore v. Kingscote, 5 B. & C. 583; Hoadley v. McLaine, 10 Bing. 482; 4 Mo. & Scott. 340;

As will be seen from the authorities cited, this ruling is generally accepted in the United States, but in New York until a late day,<sup>1</sup> and apparently in other States,<sup>2</sup> the agreement as to price must be included in the memorandum, although no price has been fixed upon.

It is also required that the memorandum should contain the stipulations as to the credit and time of performance if there be any such stipulations. In the absence of express agreement, it is usually understood to be a cash transaction, to be performed immediately, and this is implied by law.<sup>3</sup> The same rule applies to agreements as to time of delivery of the goods,<sup>4</sup> and to any other terms and conditions which the parties may have agreed upon. They must all be included in the memorandum, in order to make the contract of sale valid.<sup>5</sup> But if all the terms and conditions of the sale, the names of the parties, and the sub-

*Boydell v. Drummond*, 11 East, 142; *Ashcroft v. Monin*, 4 M. & G. 450; *Jeffcott v. N. B. Oil Co.*, 8 Ir. R. C. L. 17; *Goodman v. Griffiths*, 26 L. J. Ex. 145; 1 H. & M. 574. But it is not fatal if the price is only partly given, as where it was stated to be "9½ cents," the words "per square foot" being omitted by mistake. *Gowen v. Klous*, 101 Mass. 449.

<sup>1</sup> *Sears v. Brink*, 8 Johns. 210; *Leonard v. Vredenburg*, 8 Johns. 29.

<sup>2</sup> See *Stephens v. Winn*, 2 Nott & McCord, 373 n.; *Neelson v. Sanborne* 2 N. H. 414. In *James v. Muir*, 33 Mich. 224, the rule is applied to executory contracts.

<sup>3</sup> *Wright v. Weeks*, 25 N. Y. 158; *Williams v. Robinson*, 73 Me. 186; *Norris v. Blair*, 39 Ind. 90; *Hawkins v. Chace*, 19 Pick. 502; *Mahalen v. Dublin, &c., Distillery Co.*, 11 Ir. R. C. L. 83; *Valpy v. Gibson*, 4 C. B. 835; *Davis v. Shields*, 26 Wend. 341; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *Sales v. Hickman*, 20 Pa. St. 180; *Elfe v. Godsden*, 2 Rich. (s. c.) 373; *Morton v. Dean*, 13 Met. 388; *Buck v. Pickwell*, 1 Williams (Vt.), 167; *O'Donnell v. Leeman*, 48 Me. 158.

<sup>4</sup> *Kriete v. Myer*, 61 Md. 558; *Smith v. Shell*, 32 Mo. 215; *Hawkins v. Chace*, 19 Pick. 502.

<sup>5</sup> *Riley v. Farnsworth*, 116 Mass. 223; *Oakman v. Rogers*, 130 Mass. 214; *Broadman v. Spooner*, 13 Allen, 353 ("subject to the buyer's approval"); *Peltier v. Collins*, 3 Wend. 459, an express warranty; *Hinde v. Whitehouse*, 7 East, 558; *Peirce v. Corf.*, L. R. 9 Q. B. 210; *Rishton v. Whatmore*, 8 Ch. D. 467; *Archer v. Baynes*, 5 Ex. 625; 20 L. J. Ex. 54; *Haughton v. Morton*, 5 Ir. R. C. L. 329.

ject-matter of the sale are sufficiently described in the memorandum, it will be sufficient if the memorandum assumes the form of an offer, and the absence of any written evidence of the acceptance of the offer will not invalidate the contract, so far as the obligation of the party signing is concerned. The acceptance may be proved by parol.<sup>1</sup>

§ 77. **Signature of the party to be charged.**—The requirement of a signature to the memorandum is very liberally construed by the courts, and whatever has been done with the intention of signing is generally held to be sufficient. The signature may be written out in full, or it may consist only of the initials,<sup>2</sup> or a fictitious name,<sup>3</sup> or it may be by any other mark, which was used in the place of an ordinary signature.<sup>4</sup> It may be written in pencil,<sup>5</sup> or it may consist of a printed or stamped name.<sup>6</sup>

<sup>1</sup> *Warner v. Wellington*, 3 Drew, 523; 25 L. J. Ch. 662; *Clarke v. Gardiner*, 12 Ir. C. L. R. 472; *Smith v. Neal*, 2 C. B. N. S. 67; 26 L. J. C. P. 143; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 123; *Reuss v. Picksley*, L. R. 1 Ex. 332; 35 L. J. Ex. 218; *Justice v. Lang*, 42 N. Y. 493; *Williams v. Robinson*, 73 Me. 186; *Mason v. Dicker*, 72 N. Y. 598; *Barstow v. Gray*, 3 Greenl. 409; *Old Colony R. R. Co. v. Sears*, 6 Gray, 25; *Lowber v. Connit*, 36 Wis. 176; *Lowry v. Mehaffey*, 10 Watts, 387; *Gartell v. Stafford*, 12 Neb. 552; *Sanborn v. Flagler*, 9 Allen, 474; *Smith v. Smith*, 8 Blackf. 208; *Penniman v. Hartshorn*, 13 Mass. 87; *Shirley v. Shirley*, 6 Blackf. 452; *Ivory v. Murphy*, 36 Mo. 534; *De Cordove v. Smith*, 9 Tex. 129.

<sup>2</sup> *Sanborn v. Flagler*, 9 Allen, 474; *Palmer v. Stephens*, 1 Denio, 478; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446; *Sweet v. Lee*, 3 M. & G. 542; *Caton v. Caton*, L. R. 2 H. L. C. 127, 143; *Chichester v. Cobb*, 14 L. T. N. S. 433.

<sup>3</sup> *Augur v. Couture*, 68 Me. 427.

<sup>4</sup> *Hubert v. Moreau*, 12 Moore C. P. 216; 2 C. & P. 528; *Bickley v. Keenan*, 60 Ala. 298; *Madison v. Zabriskie*, 11 La. (O. S.) 247; *Tagiasco v. Molinan*, 9 La. (O. S.) 512; *Brown v. Butchers' Bank*, 6 Hill, 443. See *Baker v. Dening*, 8 A. & E. 94.

<sup>5</sup> *Merritt v. Clason*, 12 Johns. 102; *Clason v. Bartley*, 14 Johns. 484; *Draper v. Pattina*, 2 Speers, 292; *Greary v. Physic*, 5 B. & C. 234.

<sup>6</sup> *Bennett v. Brumfitt*, L. R. 3 C. P. 28; *Boardman v. Spooner*, 13 Allen, 353; *Brayley v. Kelly*, 25 Minn. 160.

If the statute requires the memorandum to be *subscribed*, the signature can only be made at the bottom of the writing. A signature in any other place will not satisfy the requirement of the statute.<sup>1</sup> But where the statute simply provides that the memorandum shall be *signed* by the party to be charged, the signature may appear in any part of the writing. But in that case it must appear that the writing of the name must have been done with the intention of authenticating the memorandum; and it must bear such a grammatical relation to the memorandum, as to show a reference to every part of it. If in writing the name elsewhere than at the foot of the paper, there was no intention of executing the memorandum in compliance with the statute of frauds, it is not a sufficient signature.<sup>2</sup>

§ 78. *Agent duly authorized.*—The statute provides that the memorandum of the sale should be signed by the parties to be charged, *or their agents thereunto duly authorized*. The agent must therefore be authorized, in order that his signature may satisfy the statute; and he must, of course, be free from incapacity to act as agent. It has been held that the agent must be some third person, and cannot be the opposing party to the contract.<sup>3</sup> But the better opinion is that one party might act as agent of the other in signing the memorandum, when requested so to do; but there is never any implied authority for him to act as agent, although, on account of some other relation which he bears to the transaction, as where he is also the auction-

<sup>1</sup> See *Davis v. Shields*, 26 Wend. 341; *Viele v. Osgood*, 8 Barb. 130; *James v. Patten*, 6 N. Y. 9.

<sup>2</sup> *Hawkins v. Chase*, 19 Pick. 502; *Penniman v. Hartshorn*, 13 Mass. 87; *Drury v. Young*, 58 Md. 546; *Schneider v. Norris*, 2 M. & S. 286; *Johnson v. Dodgson*, 2 M. & W. 653; *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337; *Tourret v. Cripps*, 48 L. J. Ch. 567; *Hubert v. Treherne*, 3 M. & G. 743; *Caton v. Caton*, L. R. 2 H. L. C. 127.

<sup>3</sup> *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Wright v. Dannah*, 2 Camp. 203.

eer, he would ordinarily have that implied authority. When the vendor acts as the auctioneer of his own goods, he does not have by implication the authority to bind the vendee by his signed entries of sale.<sup>1</sup>

In the case of private sales, no agent is authorized to sign for either party, without his knowledge or consent. There is never any implied agency in private sales.<sup>2</sup> And the agency is required to be established by clear and explicit evidence, there being no presumption in favor of the authorization of the agency.<sup>3</sup>

But an auctioneer has the implied authority to bind both parties by his signature to the memorandum of sale, which he makes at the time of sale.<sup>4</sup> And the same implied authority is conceded to the auctioneer's clerk, when he exercises it at the time of sale, and in the presence of the auctioneer and purchaser.<sup>5</sup> But it must be understood, that this implied authority exists only when the sale is public. The authority of an auctioneer does not apply to his private sales.<sup>6</sup> And so also, where the vendor made a contract of sale prior to the auction sale, the terms of which merely looked to the auction sales as a means of determin-

<sup>1</sup> *Bent v. Cobb*, 9 Gray, 397; *Smith v. Arnold*, 5 Mason, 414; *Tull v. David*, 45 Mo. 444. But his clerk could do so, *Johnson v. Buck*, 35 N. J. L. 342; *Frost v. Hill*, 3 Wend. 386.

<sup>2</sup> *Sewall v. Fitch*, 8 Cow. 215; *Ijams v. Hoffman*, 1 Md. 485; *Entz v. Mills*, 1 McMull. 553; *Cathcart v. Keinaghan*, 5 Strob. 129; *Meadows v. Meadows*, 3 McCord, 458; *Bamber v. Savage*, 52 Wis. 110; *Carmack v. Masterson*, 3 Stew. & P. 411.

<sup>3</sup> *Graham v. Musson*, 5 Bing. N. C. 603; *Graham v. Fretwell*, 3 M. & G. 368; *Durrell v. Evans*, 30 L. J. Ex. 254; *s. c.* 6 H. & N. 660; *s. c.* 31 L. J. Ex. 387; 1 H. & C. 174; *Murphy v. Boese*, L. R. 10 Ex. 126.

<sup>4</sup> *Hinde v. Whitehouse*, 7 East, 558; *White v. Proctor*, 4 Taunt. 209; *Walker v. Constable*, 1 B. & P. 306; *Emmerson v. Heelis*, 2 Taunt. 209; *Farebrother v. Simmons*, 5 B. & Ald. 338; *Kenworthy v. Schofield*, 2 B. & C. 945; *Durrell v. Evans*, 31 L. J. Ex. 337; 1 H. & C. 174; *Gill v. Hewett*, 7 Bush. 10.

<sup>5</sup> *Alna v. Plummer*, 4 Greenl. 258; *Price v. Durin*, 56 Barb. 647; *Harvey v. Stevens*, 48 Vt. 653; *Smith v. Jones*, 7 Leigh, 165.

<sup>6</sup> *Mews v. Carr*, 26 L. J. Ex. 39; 1 H. & C. 484.



§ 79 STATUTE OF FRAUDS, IN RESPECT TO SALES. [CH. VI.

ing the price, the real sale was not by auction, but had preceded it; and in such a case, the auctioneer was not the agent of both parties for the purpose of signing the memorandum.<sup>1</sup>

The authority of the auctioneer to represent and bind the vendor is express, or is implied from an express contract of hiring. But his authority to bind the buyer rests upon different grounds. The necessity of the case requires that the auctioneer should have the authority to bind the buyer by his entries, since there is no reasonable opportunity, in the course of an auction sale, to secure the buyer's own signature to a memorandum. There is, in fact, no substantial fact, from which the authority to bind the buyer may be implied. But, for the purpose of obtaining a show of authority, it is held that the entry and signature must be made in the presence of the buyer, his silence or acquiescence operating as a sort of ratification of the auctioneer's assumption of authority.<sup>2</sup> In some of the States, the memorandum is required by statute to be made in a "sale book" and at the time and place of sale.<sup>3</sup>

§ 79. **Broker's bought and sold notes.** — Brokers also have this implied authority to bind both parties by their

<sup>1</sup> *Bartlett v. Furnell*, 4 A. & E. 792.

<sup>2</sup> "By what authority does he (the auctioneer) write down the purchaser's name? By the authority of the purchaser. These persons bid and announce their biddings loudly, and particularly to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore, he writes the name by the authority of the purchaser, and he is an agent for the purchaser." Lord Mansfield in *Emmerson v. Heells*, 2 Taunt. 38. See *Gill v. Bicknell*, 2 Cush. 355; *M'Comb v. Wright*, 4 Johns. Ch. 659; *Crooks v. Davis*, 6 Grant (Ont.), 317. And if the memorandum is made at any other subsequent time, the consent of the buyer to its execution must have been obtained. *Horton v. McCarty*, 53 Me. 394; *Smith v. Arnold*, 5 Mason, 414; *Bamber v. Savage*, 52 Wis. 113; *Flintoff v. Elmore*, 18 Up. Can. C. P. 274.

<sup>3</sup> See *Hicks v. Whitmore*, 12 Wend. 548; *Craig v. Godfrey*, 1 Cal. 415.

signed memoranda of the sales they effect.<sup>1</sup> But this implied authority only exists where the broker actually assumes to act as the agent of both parties. This is not usual in the United States, and if the memorandum is made with no intention of binding both parties, it will not have that effect.<sup>2</sup>

In England, it is very common for brokers, in effecting sales, not only to make an entry of them on their sales books, and sign that entry, but also to issue what are called bought and sold notes, the bought note to the buyer, informing him that the broker had bought for him certain goods on the terms mentioned; and the sold note to the vendor, announcing the sale of his goods. No difficulty is experienced when the entry and the bought and sold notes agree with one another. But where they vary in the statement of terms, it becomes a difficult question to determine which must be taken as the true representation of the contract of sale. The employment of bought and sold notes is so uncommon in America, that the matter has not been very carefully considered by our courts.<sup>3</sup> But in England, these questions have been very minutely discussed, and the courts have, through a long process of evolution, settled pretty much every thing of difficulty connected with it, of course, after making allowances for a few irreconcilable decisions.

Although it was once held to the contrary,<sup>4</sup> it is now

<sup>1</sup> See *Butler v. Thomson*, 92 U. S. 412; *Newberry v. Wall*, 84 N. Y. 576; *Coddington v. Goddard*, 16 Gray, 486. So have their clerks. *Williams v. Wood*, 16 Md. 220.

<sup>2</sup> *Shaw v. Finney*, 13 Met. 453; *Aguire v. Allen*, 10 Barb. 74.

<sup>3</sup> See on this subject, *Snydom v. Clark*, 5 Sandf. 123; *Bacon v. Eccles*, 43 Wis. 241; *Calkins v. Falk*, 1 Abb. App. 291; *Canterberry v. Miller*, 75 Ill. 355; *Phippen v. Hylan d.*, 19 Up. Can. C. P. 416; *Butters v. Glass*, 31 Up. Can. Q. B. 379.

<sup>4</sup> *Cumming v. Roebuck*, Holt, 172; *Thornton v. Meux*, M. & M. 48; *Groom v. Afalo*, 6 B. & C. 117; *Trueman v. Loder*, 11 A. & E. 509; *Townend v. Drakeford*, 1 Car. & K. 20.

settled that the broker's signed entry in his "sales book" constitutes the binding contract, and not the bought and sold notes.<sup>1</sup> But where there is no signed entry in the sales book, either no entry at all or an unsigned entry, the bought and sold notes will constitute a sufficient proof of the contract.<sup>2</sup> If there be no variance between the notes, the contract may be proved by the introduction of only one of the notes.<sup>3</sup> And the presumption is always against there being a variance. But, of course, the defendant can always establish a variance by the introduction of the other note.<sup>4</sup>

If there is a variance between the bought note and the sold note, the signed entry, if there be one, will govern and determine what the contract is. But if the bought and sold notes agree, but they differ from the signed entry, then the notes, if accepted by the parties, will be considered as evidence of a new contract which the parties have thus made.<sup>5</sup> But if there is no signed entry, and the bought and sold notes fail to agree, and there is no other writing setting forth the terms of the contract, then there is no valid contract, and the parties are not bound by the transaction.<sup>6</sup>

But a variance is not caused by a mere difference of language, provided the meaning of the several memoranda is the same.<sup>7</sup>

<sup>1</sup> *Thornton v. Charles*, 9 M. & W. 802; *Heyman v. Neale*, 2 Camp. 387; *Stevewright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 115; *Thompson v. Gardiner*, 1 C. P. D. 777.

<sup>2</sup> *Groom v. Afalo*, 6 B. & C. 117; *Stevewright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 115.

<sup>3</sup> *Hawes v. Forster*, 1 Mood. & Rob. 368.

<sup>4</sup> *Hawes v. Forster*, 1 Mood. & Rob. 368.

<sup>5</sup> *Hawes v. Forster*, 1 Mood. & Rob. 368; *Thornton v. Charles*, 9 M. & W. 802; *Stevewright v. Archibald*, 17 Q. B. 115; 20 L. J. Q. B. 529.

<sup>6</sup> *Thornton v. Kempster*, 5 Taunt. 786; *Cumming v. Roebuck*, Holt, 172; *Thornton v. Meux*, 1 M. & M. 48; *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Rucks*, 4 Q. B. 747; *Stevewright v. Archibald*, 17 Q. B. 115; 20 L. J. Q. B. 529.

<sup>7</sup> *Bold v. Rayner*, 1 M. & W. 342; *Stevewright v. Archibald*, 20 L. J.

§ 80. **Principal's name need not be signed.**—While it is the general rule of the common law that the contract should run in the name of the principal, in order to make it his contract, the statute of frauds is held not to require such a signature to hold the real principal on the contract. The requirement of the statute is satisfied if the memorandum is signed by an agent, in his own way, thereunto duly authorized. In such a case, the other party has his right of election, whether he shall hold the agent or principal liable.<sup>1</sup>

Q. B. 529; 17 Q. B. 115; *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J. Ex. 227; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191.

<sup>1</sup> See *ante*, § 73.

## CHAPTER VII.

### THE TRANSFER OF TITLE.

**SECTION 82. Executory and executed contracts of sale distinguished — Importance of the question.**

83. The transfer of title governed primarily by intention of the parties.
84. Delivery when essential to transfer of title.
- 84a. Delivery how far essential to transfer of title as against creditors and subsequent purchasers.
85. Delivery without transfer of title — Reservation of *jus disponendi* — Prepayment of price.
86. Sale of specific goods unconditionally.
87. Sale of specific goods conditionally.
88. Sale of goods not specific.
89. What constitutes a sufficient appropriation in sales of goods not specific.

§ 82. **Executory and executed contracts of sale distinguished — Importance of the question.** — The object of all contracts of sale is to transfer the title of the goods. As long as the title or possession of the goods is not transferred, still remains in the vendor, the contract remains executory; and it becomes executed when the title and possession are both transferred to the vendee. It is an important question in many cases, when the title has been transferred, either to determine on whom the loss will fall, where the goods have been destroyed or lost,<sup>1</sup> or to ascer-

<sup>1</sup> See *Rugg v. Minett*, 11 East, 200; *Zagney v. Furnell*, 3 Camp. 240; *Logan v. LaMesurier*, 6 Moore P. C. 116; *Gilmour v. Supple*, 11 Moore P. C. 551; *Martineau v. Kitching*, L. R. 7 Q. B. 486; *Anderson v. Morice*, 1 App. Cas. 718; *Ex. Ch. L. R. 10 C. P. 609*; *s. c. ib. 58*; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271; *Oliphant v. Baker*, 5 Denio, 379; *Gilbert v. N. Y. Cent. R. R. Co.*, 4 Hun, 378; *Joyce v. Adams*, 8 N.

tain whether the creditors of the vendor and vendee can attach or levy on on the subject-matter of the sale.<sup>1</sup> There may be other reasons for determining the time and fact of transfer of title, such as to which of two vendees owns the goods, and what form of action must be used in the recovery of goods, but these two are the common and most important.<sup>2</sup>

§ 83. **The transfer of title governed primarily by intention of parties.** — The primary factor in the determination of the transfer of title is in the intention of the parties. This intention may be expressed or it may be implied from the surrounding circumstances and the condition of the goods.<sup>3</sup> And what the intention of the parties is always

Y. 291; *Lingham v. Eggleston*, 27 Mich. 324; *Pleasants v. Pendleton*, 6 Rand. 473; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Waldo v. Belcher*. 11 Ired. 609.

<sup>1</sup> *Brewer v. Smith*, 3 Greenl. 44; *Golder v. Ogden*, 15 Pa. St. 358; *Weld v. Cutler*, 2 Gray, 195; *Hurff v. Hires*, 89 N. J. L. 4; 40 N. J. L. 581; *Hanson v. Meyer*, 6 East, 614; *Acraman v. Morris*, 8 C. B. 449; *Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 A. & E. 448; *Laidler v. Burlinson*, 2 M. & W. 602; *Wood v. Bell*, 5 E. & B. 772; 25 L. J. Q. B. 148; *Goss v. Quinton*, 3 M. & G. 825; *Hale v. Huntley*, 21 Vt. 147; *Comfort v. Kiersted*, 26 Barb. 472; *Smart v. Batchelder*, 51 N. H. 140; *Riddle v. Varnum*, 20 Pick. 280; *Ward v. Shaw*, 7 Wend. 404; *Fosdick v. Schall*, 99 U. S. 235.

<sup>2</sup> *Kimberly v. Patchin*, 19 N. Y. 380; *Horr v. Barker*, 8 Cal. 603; *Pfistner v. Bird*, 43 Mich. 14; *Crofoot v. Bennett*, 2 N. Y. 258; *Kershaw v. Ogden*, 34 L. J. Ex. 159; 3 H. & C. 717; *Barrow v. Coles*, 3 Camp, 92; *Mires v. Solesby*, 2 Mod. 243; *Groat v. Gile*, 51 N. Y. 481; *Cushman v. Holyoke*, 34 Me. 289; *Devane v. Fennell*, 2 Ired. 37; *Davis v. Hill*, 3 N. H. 382; *Strauss v. Ross*, 25 Ind. 800.

<sup>3</sup> *Elgee v. Cotton Cases*, 22 Wall. 187; *Hatch v. Oil Co.*, 100 U. S. 181; *Bellows v. Wells*, 36 Vt. 599; *Fitch v. Burk*, 38 Vt. 689; *Russell v. Carlington*, 42 N. Y. 118; 1 Am. Rep. 498; *Callaghan v. Myers*, 89 Ill. 570; *Weed v. Boston Ice Co.*, 12 Allen, 377; *Morse v. Sherman*, 106 Mass. 433; *Dugan v. Nichols*, 125 Mass. 73; *Terry v. Wheeler*, 25 N. Y. 525; *Cunningham v. Ashbrook*, 20 Mo. 553; *Hurd v. Cook*, 75 N. Y. 454; *Stone v. Peacock*, 35 Me. 388; *Lester v. East*, 49 Ind. 588; *Ogg v. Sluter*, L. R. 10 C. P. 459; *Sewell v. Eaton*, 6 Wis. 490; *Fletcher v. Ingram*, 46 Wis. 201; *Gleason v. Knapp*, 26 Up. Can. C. P. 553; *Ross v. Eby*, 28 Up. Can.

a question of fact for the jury.<sup>1</sup> But in many cases, if not in most of the cases, the evidence, not only does not disclose what the intention of the parties was, but in fact shows that the parties had no clearly defined intentions as to the time and fact of the transfer of title. In all such cases, the intention must be implied from the facts of the particular case.<sup>2</sup> But where the intention is express that the title shall or shall not pass at a specified time, it does not matter what implication as to intention the facts would raise. The express intention supersedes the implied intention, and can be effectuated almost under any condition of facts.<sup>3</sup>

§ 84. **Delivery when essential to transfer of title.** — The subject of delivery is fully treated elsewhere.<sup>4</sup> We are in this connection only concerned with the effect of delivery on the question of transfer of title. Unfortunately, the word “delivery” is used in more than one sense, and in consequence of this divergence of meaning the authorities have become confusing on many important points. The simplest sense in which the word is used makes the word synonymous with “transfer of posses-

1 C. P. 316; *Lingham v. Eggleston*, 27 Mich. 324; *Sprague v. King*, 1 Pugs. & B. 299; *Gibson v. McKean*, 3 Pugs. 299.

<sup>2</sup> *George v. Stubbs*, 26 Me. 250; *Marble v. Moore*, 102 Mass. 443; *Kidder v. McKnight*, 13 Johns. 294; *McClurg v. Kelly*, 21 Iowa, 508; *Caywood v. Timmons*, 31 Kan. 394; *Riddle v. Varnum*, 20 Pick. 280; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 296; *Dyer v. Libby*, 61 Me. 45; *Fuller v. Bean*, 84 N. H. 290; *Kelsea v. Haines*, 41 N. H. 253; *Wilkinson v. Holliday*, 33 Mich. 386. But if all the evidence clearly points in one direction, the court may direct the jury to find a verdict accordingly. See *Wigton v. Bowley*, 130 Mass. 254.

<sup>3</sup> See *Riddle v. Varnum*, 20 Pick. 283; *Stephens v. Santee*, 49 N. Y. 35; *Chapman v. Shepard*, 39 Conn. 413; *Bethel Steam Mill Co. v. Brown*, 57 Me. 18.

<sup>4</sup> See *Turley v. Bates*, 2 Hurl. & C. 200; *Logan v. Le Mesurier*, 11 Moore P. C. C. 116; *Wilkinson v. Holiday*, 33 Mich. 386.

<sup>5</sup> See *post*, Chapter VIII. For a discussion of the delivery in the case of a sale of goods not specific, see *post*, § 89.

sion." But it is very often used in the sense of a transfer of title, particularly where, in the absence of any actual transfer of possession, the writers speak of "constructive delivery." If the word is used in the latter sense, and the doctrine of "constructive delivery" is recognized in the extreme to which it has been carried by some of the authorities, it would be neither wrong nor misleading to assert that no title ever passes without delivery, either actual or constructive.<sup>1</sup> But if by "delivery" is meant a transfer of the possession from the vendor to the vendee, or his duly authorized agent, it is equally sound to state, that, as between the parties to the sale,<sup>2</sup> the title can pass, if the parties so intend, although there be no delivery. Delivery is not essential to the transfer of title, unless it be shown that the parties did not intend to pass the title before delivery.<sup>3</sup> But where, by the contract of sale, the

<sup>1</sup> See *Dugan v. Nichols*, 125 Mass. 43; *Phillbrook v. Eaton*, 134 Mass. 400; *McNamara v. Edmister*, 11 Hun, 597; *Bradley v. Wheeler*, 4 Roberts, 19; *Merrill v. Parker*, 24 Me. 89; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Goddařd v. Binney*, 115 Mass. 450; *Muckey v. Howenstein*, 3 Thomp. & C. 28; *Means v. Williamson*, 37 Me. 556; *Chapman v. Searle*, 3 Pick. 88; *Partridge v. Wooding*, 44 Conn. 277; *Chamberlain v. Farr*, 23 Vt. 265.

<sup>2</sup> As to the right of creditors, see *post*, § 84a.

<sup>3</sup> *Gilmour v. Supple*, 11 Moore P. C. 551; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 326; *Simmons v. Swift*, 5 B. & C. 857; *Tarling v. Baxter*, 6 B. & C. 360; *Dixon v. Yates*, 5 Barn. & Ad. 313; *Hinde v. Whitehouse*, 7 East, 558; *Wade v. Moffitt*, 21 Ill. 110; 74 Am. Dec. 79; *Newcomb v. Cabell*, 10 Bush, 460, 468; *Taylor v. Twenty-five Bales of Cotton*, 26 La. An. 247; *Nance v. Metcalf*, 19 Mo. App. 183; *Ricker v. Cross*, 5 N. H. 570; *Puckett v. Reed*, 31 Ark. 131; *Hooben v. Bidwell*, 16 Ohio, 509; *Willis v. Willis*, 6 Dana, 48; *Potter v. Coward*, Meigs, 22, 26; *Pierce v. Moore*, 1 Tex. App. (Civ. Cas.) 911; *Anderson v. Levyson*, 1 Tex. App. (Civ. Cas.) 927; *Bertelson v. Bowars*, 31 Ind. 512; *Upton v. Holmes*, 51 Conn. 500; *Nicolopulo v. His creditors*, 37 La. An. 472; *Mason v. Thompson*, 18 Pick. 305; *Brown v. Childs*, 2 Duvall, 314; *Tompkins v. Tibbitts*, 1 Hannay (N. B.) 317; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Thompson v. Cincinnati, etc., R. R. Co.*, 1 Bond, 152; *Congar v. Galena, etc., R. R. Co.*, 17 Wis. 477; *The Venus*, 8 Cranch, 275; *Devine v. Edwards*, 101 Ill. 138; *Suit v. Woodhall*, 113 Mass. 394.



vendor is obliged to make delivery of the goods to the vendee in person or by agent, or by deposit at some designated place, instead of simply preparing the goods for their removal by the vendee, the title is presumed, in the absence of any express intention of the parties to the contrary, to remain in the vendor, until there has been a delivery in accordance with the terms of the contract.<sup>1</sup> If the vendor has agreed to deliver goods at one of two places, before the title will pass, so as to transfer the risk, he must have deposited the goods at one of the places, and notified the vendee, at which place they were deposited.<sup>2</sup> But, while it is the general rule that the title does not pass before delivery, where the parties have stipulated for a delivery by the vendor, yet it is not always the case. If the parties intended that the title shall pass before delivery, the intention will be carried out. This intention may be proven by express declaration,<sup>3</sup> or inferred from circumstances. Thus, the intention to pass title immediately will be inferred from the understanding of the parties that the buyer must thereafter designate the place of delivery,<sup>4</sup> where the buyer employs the seller to transfer, thus

<sup>1</sup> *Pratt v. Maynard*, 116 Mass. 388; *Rattary v. Cook*, 50 Ala. 352; *Washburn Iron Co. v. Russell*, 130 Mass. 543; *Hunt v. Thurman*, 15 Vt. 336; *Phelps v. Hubbard*, 51 Vt. 389; *Sanborn v. Benedict*, 78 Ill. 309; *Hening v. Powell*, 33 Miss. 468; *Bement v. Smith*, 15 Wend. 493; *Boyd v. Pollock*, 27 W. Va. 75; *Sedgwick v. Cottingham*, 54 Iowa, 512; *Pac. Iron Works v. Long Island R. R. Co.*, 62 N. Y. 272; *Denman v. Cherokee Iron Co.*, 56 Ga. 319; *Odell v. Boston, etc., R. R. Co.*, 109 Mass. 50; *Richmond Iron Works v. Woodruff*, 8 Gray, 447; *Council Bluffs Iron Co. v. Cuppey*, 41 Iowa, 104; *Cocker v. Franklin Hemp Co.*, 3 Sumn. 530; *Steele Works v. Dewey*, 37 Ohio St. 242; *Smith v. Wheeler*, 7 Oreg. 49; *Corwith v. Colter*, 82 Ill. 535; *Taylor v. Cole*, 111 Mass. 363. But see *Terry v. Wheeler*, 25 N. Y. 520.

<sup>2</sup> *Rogers v. Van Hoessen*, 12 Johns. 221.

<sup>3</sup> *Lynch v. O'Donnell*, 127 Mass. 311. See *Commonwealth v. Greenfield*, 121 Mass. 40.

<sup>4</sup> *Hunter v. Wetsell*, 84 N. Y. 549; *Higgins v. Murray*, 73 N. Y. 549; *Weld v. Cane*, 98 Mass. 152; *Higgins v. Cheesman*, 9 Pick. 7.

assuming the character of a carrier,<sup>1</sup> and, particularly, where everything is done besides delivery, including the payment of the price,<sup>2</sup> and whenever there is evidence showing that the continued possession of the goods by the vendor was in the character of bailee and for the benefit of the vendee.<sup>3</sup>

It is very often important to determine whether the title passes by delivery to the common carrier, in order to settle the question of legality of the contract, where it is a case of interstate commerce, and the contract is illegal in one of the States and legal in the other State.<sup>4</sup>

§ 84a. **Delivery, how far essential to transfer of title as against creditors and subsequent purchasers.** — While, as between the parties to the sale, the delivery of possession is not essential to the transfer of the title, except when the contract calls for an actual delivery by the vendor; yet, as against creditors and subsequent purchasers, the retention of the possession by the vendor is held by the English and American authorities to be a badge of fraud upon creditors and subsequent purchasers, and as against them the title of the buyer is not absolute. In many of the States, including New York, Maryland, Delaware, Missouri, Indiana, Iowa, Minnesota, Wisconsin, Nebraska and California, as well as in England, there are statutory regulations of the effect of retention of possession by the

<sup>1</sup> *Lingham v. Eggleston*, 27 Mich. 324; *Hobbs v. Carr*, 127 Mass. 532. See *Whitcomb v. Whitney*, 24 Mich. 486; *Shelton v. Franklin*, 68 Ill. 333; *Newcomb v. Cabell*, 10 Bush, 460.

<sup>2</sup> *Terry v. Wheeler*, 25 N. Y. 520. See *Hunter v. Wetsell*, 84 N. Y. 549; *Gray v. Mayor of New York*, 46 N. Y. S. C. 494; *Boynton v. Veazie*, 24 Me. 286; *Underhill v. Boom Co.*, 40 Mich. 660; *Muskegon Boom Co. v. Underhill*, 43 Mich. 629; *Bethel Steam Mills v. Brown*, 57 Me. 9.

<sup>3</sup> See *Bethel Steam Mills Co. v. Brown*, 57 Me. 9.

<sup>4</sup> *Orcutt v. Nelson*, 1 Gray, 537; *Frank v. Hoey*, 128 Mass. 263; *Sortwell v. Hughes*, 1 Curtis, 244; *Woolsey v. Bailey*, 27 N. H. 217; *Smith v. Smith*, 27 N. H. 244; *Garland v. Lane*, 46 N. H. 245; *Arnold v. Prout*, 51 N. H. 587; *Sarbecker v. State*, 65 Wis. 675.

vendor; but, with or without statutory regulations, the same question is raised everywhere, inasmuch as the main question is held to rise under the common law, and independently of the English statute. Partly affected by the phraseology of the statutory regulations, the authorities are divided as to the effect on the rights of creditors of the vendor's retention of possession. The generally prevailing rule is that the retention of possession by the vendor is only *prima facie* evidence of fraud on creditors and subsequent purchasers, which only becomes conclusive upon the failure to rebut the presumption of fraud. Such is the rule in England,<sup>1</sup> in the United States courts,<sup>2</sup> in Alabama,<sup>3</sup> Arkansas,<sup>4</sup> Georgia,<sup>5</sup> Indiana,<sup>6</sup> Kansas,<sup>7</sup> Louisiana,<sup>8</sup> Maine,<sup>9</sup>

<sup>1</sup> *Martindale v. Booth*, 3 Barn. & Ad. 498; *Lady Arundel v. Phipps*, 10 Ves. Jr. 145; *Pennell v. Davidson*, 18 C. B. 355; *Edwards v. Harben*, 2 T. R. 587; *Hazlington v. Gill*, 3 T. R. 620, note (a); *Lindon v. Sharp*, 6 M. & G. 895-898.

<sup>2</sup> *Warner v. Norton*, 20 How 448. But see, *contra*, until recently, *Hamilton v. Russell*, 1 Cranch, 309; *United States v. Howe*, 3 Cranch, 73; *Meeker v. Wilson*, 2 Gall. 419; *Prettiplace v. Sayles*, 4 Mason, 321, 322; *United States v. Conyngham*, 4 Dall. 358.

<sup>3</sup> *Hobbs v. Bibb*, 2 Stew. 54; *Millard v. Hall*, 24 Ala. 209; *Wyatt v. Steward*, 34 Ala. 716; *Mayer v. Clark*, 40 Ala. 259, 269; *Maggs v. Benedicks*, 49 Ala. 512; *Crawford v. Kirksey*, 50 Ala. 590; 55 Ala. 282, 285.

<sup>4</sup> *Field v. Simco*, 2 Eng. 269; *Hempstead v. Johnson*, 18 Ark. 123, 124; *George v. Norris*, 23 Ark. 121.

<sup>5</sup> *Peck v. Land*, 2 Kelly, 1; *Fleming v. Townsend*, 6 Ga. 103, 104; *Carter v. Stanfield*, 8 Ga. 49; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Collins v. Taggart*, 57 Ga. 355.

<sup>6</sup> *Watson v. Williams*, 4 Blackf. 26; *Case v. Winship*, 4 Blackf. 425; *Mitter v. Harris*, 9 Ind. 88; *Kane v. Drake*, 27 Ind. 29; *Rose v. Colter*, 76 Ind. 590.

<sup>7</sup> *Wolfey v. Rising*, 8 Kan. 297; *Phillips v. Reitz*, 16 Kan. 396; *Denny v. Faulkner*, 22 Kan. 89; *Frankhouser v. Ellett*, 22 Kan. 127.

<sup>8</sup> *Miltnerberger v. Parker*, 17 La. An. 254; *Keller v. Blanchard*, 19 La. An. 53; *Richardson v. Cramer*, 28 La. An. 357; *Spiney v. Wilson*, 31 La. An. 653; *Devonshire v. Gathreaux*, 32 La. An. 1132.

<sup>9</sup> *Cutter v. Copeland*, 18 Me. 127; *Vinning v. Gilbreth*, 39 Me. 496; *Sawyer v. Nichols*, 40 Me. 212; *McKee v. Garcelon*, 60 Me. 165; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Farrar v. Smith*, 64 Me. 74; *Reed v. Reed*, 70 Me. 504.

Massachusetts,<sup>1</sup> Michigan,<sup>2</sup> Minnesota,<sup>3</sup> Mississippi,<sup>4</sup> Nebraska,<sup>5</sup> New Hampshire,<sup>6</sup> New Jersey,<sup>7</sup> New York,<sup>8</sup> North Carolina,<sup>9</sup> Ohio,<sup>10</sup> Oregon,<sup>11</sup> Rhode Island,<sup>12</sup> South Carolina,<sup>13</sup>

<sup>1</sup> *Brooks v. Powers*, 15 Mass. 244; *Bartlett v. Williams*, 1 Pick. 288; *Shumway v. Rutter*, 7 Pick. 56; *Carter v. Willard*, 19 Pick. 1, 11; *Packard v. Wood*, 4 Gray, 307; *Rourke v. Bullens*, 8 Gray, 549; *Veazie v. Somerby*, 5 Allen, 280; *Burge v. Cone*, 6 Allen, 412; *Lanfear v. Sumner*, 17 Mass. 110; *Ingalls v. Henick*, 108 Mass. 351; *Dempsey v. Gardner*, 127 Mass. 381; *Harlow v. Hall*, 132 Mass. 232.

<sup>2</sup> *Jackson v. Dean*, 1 Dougl. (Mich.) 519; *Bagg v. Jerome*, 7 Mich. 145; *Natch v. Fowler*, 28 Mich. 205; *Molitor v. Robinson*, 40 Mich. 200; *Webster v. Bailey*, 40 Mich. 641; *McLaughlin v. Lange*, 42 Mich. 81; *Carpenter v. Graham*, 42 Mich. 191.

<sup>3</sup> *Blackman v. Wheaton*, 13 Minn. 326; *Vose v. Stickney*, 19 Minn. 367.

<sup>4</sup> *Carter v. Graves*, 6 How. (Miss.) 9; *Rankin v. Holloway*, 3 Smed. & M. 614; *Comstock v. Rayford*, 12 Smed. & M. 369; *Summers v. Roas*, 42 Miss. 749; *Hilliard v. Cagle*, 46 Miss. 300; *Ketchum v. Brennan*, 53 Miss. 596.

<sup>5</sup> *Robison v. Uhl*, 6 Neb. 328; *Morgan v. Bogue*, 7 Neb. 429; *Densmore v. Tomer*, 11 Neb. 118; *Miller v. Morgaň*, 11 Neb. 121.

<sup>6</sup> *Coburn v. Pickering*, 3 N. H. 415; *Trask v. Bowers*, 4 N. H. 309; *Paul v. Crooker*, 8 N. H. 288; *French v. Hall*, 9 N. H. 145; *Clarke v. Morse*, 10 N. H. 236; *Kendall v. Fitts*, 22 N. H. 1, 7; *Putnam v. Osgood*, 32 N. H. 148; *Clapp v. Rogers*, 38 N. H. 435; *Sumner v. Dalton*, 38 N. H. 295; *Stow v. Taft*, 38 N. H. 445; *Coolidge v. Melvin*, 42 N. H. 510; *Cutting v. Jackson*, 56 N. H. 252; *Crawford v. Forristall*, 57 N. H. 102; 58 N. H. 114; *Plaisted v. Holmes*, 58 N. H. 293.

<sup>7</sup> *Hall v. Snowhill*, 14 N. J. L. 8; *Miller v. Pancoast*, 29 N. J. L. 250; *Runyon v. Groshen*, 12 N. J. Eq. 86; *Parr v. Brady*, 37 N. J. L. 201. *Contra*, *Chumar v. Wood*, 1 Halst. 155.

<sup>8</sup> *Hanford v. Artcher*, 4 Hill, 271; *Thompson v. Blanchard*, 4 N. Y. 303; *Ball v. Loomis*, 29 N. Y. 412, 415; *Mitchell v. West*, 55 N. Y. 107; *May v. Walter*, 56 N. Y. 8; *Tilson v. Terwilliger*, 56 N. Y. 273; *Blant v. Gabler*, 77 N. Y. 461; *Steele v. Benham*, 84 N. Y. 634.

<sup>9</sup> *Rea v. Alexander*, 5 Ired. 644; *Boone v. Hardie*, 33 N. C. 470.

<sup>10</sup> *Rogers v. Dare*, *Wright*, 136; *Burbridge v. Seeley*, *Wright*, 359; *Barr v. Hatch*, 3 Ohio, 327; *Hornbeck v. Van Metre*, 9 Ohio, 153; *Collins v. Meyers*, 16 Ohio, 547, 552.

<sup>11</sup> *Moore v. Floyd*, 4 Oreg. 101; *McCully v. Swackhamer*, 6 Oreg. 438.

<sup>12</sup> *Anthony v. Wheatons*, 7 R. I. 490, 498; *Sarle v. Arnold*, 7 R. I. 582; *Meade v. Gardner*, 13 R. I. 257.

<sup>13</sup> *Pregnall v. Miller*, 21 S. C. 385 (53 Am. Rep. 684). See *Terry v. Belcher*, 1 Ball. (S. C.) 568; *Smith v. Henry*, 2 Ball. 118; *Fulmore v. Burrows*, 2 Rich. Eq. 96; *Garrett v. Rhame*, 9 Rich. 407; *Quiznard v.*

Tennessee,<sup>1</sup> Texas,<sup>2</sup> Virginia,<sup>3</sup> Wisconsin.<sup>4</sup> On the other hand, the older English doctrine, as laid down in *Edwards v. Harber*,<sup>5</sup> in very guarded terms, is adopted in many of the States, without any material qualification, and the rule established, that the retention of possession is conclusive evidence of fraud on creditors and subsequent purchasers. This rule has been adopted and followed in California,<sup>6</sup> Colorado,<sup>7</sup> Connecticut,<sup>8</sup> Delaware,<sup>9</sup> Florida,<sup>10</sup> Illinois,<sup>11</sup>

*Aldrich*, 10 Rich. Eq. 253; *Jones v. Blake*, 2 Hill. Ch. 686; *Pringle v. Phame*, 10 Rich. 74.

<sup>1</sup> *Grubbs v. Greer*, 5 Coldw. 160; *Darwin v. Handley*, 3 Yerg. 502; *Callen v. Thompson*, 3 Yerg. 475; *Young v. Pate*, 4 Yerg. 164; *Maney v. Killough*, 7 Yerg. 448; *Galt v. Dibrell*, 10 Yerg. 146; *Tenn. Nat. Bank v. Ebbert*, 9 Heisk. 153; *Casey v. Casey*, 7 Baxt. 204; *Wiley v. Lashlee*, 8 Humph. 717.

<sup>2</sup> *Bryant v. Kelton*, 1 Tex. 415, 431; *Gibson v. Hill*, 21 Tex. 225; *Green v. Banks*, 24 Tex. 508; *Thornton v. Tandy*, 39 Tex. 544; *Kerr v. Hutchins*, 46 Tex. 384; *Scott v. Alford*, 53 Tex. 82, 92; *Edwards v. Dickson*, 66 Tex. (1886) 2613; 2 S. W. Rep. 718.

<sup>3</sup> *Davis v. Turner*, 4 Gratt. 422; *Forkner v. Stewart*, 6 Gratt. 197; *Dance v. Seaman*, 11 Gratt. 778; *Lipe v. Earman*, 26 Gratt. 563; *Balt., etc., v. R. Co. v. Glenn*, 28 Md. 287, discussing Virginia law.

<sup>4</sup> *Sterling v. Ripley*, 3 Chand. (Wis.) 166; *Whitney v. Brunette*, 3 Wis. 621; *Smith v. Welch*, 10 Wis. 91; *Grant v. Lewis*, 14 Wis. 487; *Bullis v. Borden*, 21 Wis. 135; *Williams v. Porter*, 41 Wis. 422.

<sup>5</sup> 2 T. R. 587.

<sup>6</sup> *Wood v. Bugby*, 29 Cal. 466; *O'Brien v. Chamberlain*, 50 Cal. 285; *Watson v. Rodgers*, 53 Cal. 401; *Grum v. Bainey*, 55 Cal. 254.

<sup>7</sup> *McCraw v. Welch*, 2 Col. 284; *Bassinger v. Spangler*, 9 Col. 175.

<sup>8</sup> *Fatten v. Smith*, 5 Conn. 196; *Swift v. Thompson*, 9 Conn. 63, 69; *Osborne v. Tuller*, 14 Conn. 529; *Kirtland v. Snow*, 20 Conn. 23; *Lake v. Morris*, 30 Conn. 201; *Norton v. Doolittle*, 32 Conn. 411; *Hall v. Gaylor*, 37 Conn. 550; *Halstat v. Blakeslee*, 41 Conn. 301; *Mead v. Noyes*, 44 Conn. 487.

<sup>9</sup> *Perry v. Foster*, 3 Harr. 293; *Burman v. Herring*, 4 Harring. 458; *Taylor v. Richardson*, 4 Houst. 300.

<sup>10</sup> *Gibson v. Love*, 4 Fla. 217, 238; *Wilson v. Lott*, 5 Fla. 305, 325; *Smith v. Hines*, 10 Fla. 285, 295.

<sup>11</sup> *Thornton v. Davenport*, 1 Scam. 296; *McCann v. Meyer*, 4 Bradw. 376; *Davis v. Ransom*, 18 Ill. 396; *Thompson v. Yeck*, 21 Ill. 73; *Ketchum v. Watson*, 24 Ill. 591; *Walker v. Collier*, 37 Ill. 362; *Young v. Bradley*, 68 Ill. 553; *Broadwell v. Howard*, 77 Ill. 305; *Strauss v. Minze-*

Iowa,<sup>1</sup> Kentucky,<sup>2</sup> Maryland,<sup>3</sup> Missouri,<sup>4</sup> Nevada,<sup>5</sup> Pennsylvania,<sup>6</sup> Vermont.<sup>7</sup> The rule, that the vendor's retention of possession operates as a fraud on the creditors and subsequent purchasers, has been held not to apply to judicial and other forced sales; if for no other reason, because the publicity of the sale gives sufficient notoriety to prevent

sheimer, 78 Ill. 492; *Thompson v. Wilhite*, 81 Ill. 456; *Lefever v. Mires*, 81 Ill. 456; *Ticknor v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Ill. 889; *Rogier v. Williams*, 92 Ill. 187; *Dunning v. Mead*, 90 Ill. 376.

<sup>1</sup> *Prattler v. Parker*, 24 Iowa, 26; *Hesser v. Wilson*, 36 Iowa, 152; *Boothby v. Brown*, 40 Iowa, 104; *Sutton v. Barlow*, 46 Iowa, 577; *McKay v. Clapp*, 47 Iowa, 318; *Smith v. Champney*, 50 Iowa, 174; *Hickok v. Buell*, 51 Iowa, 655.

<sup>2</sup> *Robbins v. Oldham*, 1 Duv. 28; *Hundley v. Webb*, 3 J. J. Marsh. 648; *Allen v. Johnson*, 4 J. J. Marsh. 285; *Brummel v. Stockton*, 3 Dana, 135; *Anthony v. Wade*, 1 Bush, 110; *Morton v. Ragan*, 5 Bush, 384; *Woodrow v. Davis*, 2 B. Mon. 298; *Kendall v. Hughes*, 7 B. Mon. 368. But see *Daniel v. Morrison*, 6 Dana, 185; *Enders v. Williams*, 1 Met. (Ky.) 252; *Cummings v. Griggs*, 2 Duv. 87; *Vanmeter v. Estill*, 78 Ky. 456.

<sup>3</sup> *Gough v. Edelen*, 5 Gill, 101; *Green v. Treiber*, 3 Md. 28; *Bruce v. Smith*, 3 H. & J. 499.

<sup>4</sup> *Clafin v. Rosenberg*, 42 Mo. 489; 43 Mo. 593; *Lesem v. Nerriford*, 44 Mo. 23; *Bishop v. O'Connell*, 56 Mo. 158; *Burgert v. Borchart*, 59 Mo. 80; *Wright v. Cormick*, 67 Mo. 426; *Stern v. Henley*, 68 Mo. 262; *Cator v. Collins*, 2 Mo. App. 225; *Basse v. Thomas*, 3 Mo. App. 472; *Franklin v. Gummersell*, 11 Mo. App. 306, 311; *Allen v. Massey*, 17 Wall. 851.

<sup>5</sup> *Carpenter v. Clark*, 2 Nev. 248; *Lawrence v. Burnham*, 4 Nev. 361; *Gray v. Sullivan*, 10 Nev. 416.

<sup>6</sup> *Dames v. Cope*, 4 Binn. 258; *Clow v. Woods*, 5 S. & R. 275; *Babb v. Clemson*, 10 S. & R. 428; *Shaw v. Levy*, 17 S. & R. 99; *McKibben v. Martin*, 64 Pa. St. 352; *Bentz v. Rockey*, 69 Pa. St. 71; *Miller v. Garman*, 69 Pa. St. 134; *Garman v. Cooper*, 72 Pa. St. 32; *Worman v. Kramer*, 73 Pa. St. 378; *Bond v. Bronson*, 80 Pa. St. 360; *Maynes v. Atwater*, 88 Pa. St. 496; *Bismarck Bldg Assn. v. Bolster*, 92 Pa. St. 123; *Parks v. Smith*, 94 Pa. St. 46; *Pearson v. Carter*, 94 Pa. St. 275; *Barr v. Boyle*, 96 Pa. St. 31; *Dougherty v. Haggerty*, 96 Pa. St. 515; *Crawford v. Davis*, 99 Pa. St. 576.

<sup>7</sup> *Weeks v. Wood*, 2 Aik. 64; *Boardman v. Keeler*, 1 Aik. 158; *Mott v. McNiell*, 1 Aik. 162; *Wilson v. Hooper*, 12 Vt. 653; *Rockwood v. Collamer*, 14 Vt. 141; *Mills v. Warner*, 19 Vt. 609; *Stephenson v. Clark*, 20 Vt. 624; *Parker v. Hendrick*, 29 Vt. 388; *Houston v. Howard*, 39 Vt. 54; *Daniels v. Nelson*, 41 Vt. 161; *Pettingill v. Elkins*, 50 Vt. 431; *Weeks v. Prescott*, 53 Vt. 57; *Hildreth v. Fitts*, 53 Vt. 684; *Rothschild v. Rowe*, 44 Vt. 389.

any presumption of fraud.<sup>1</sup> It is also unnecessary, as against creditors, to deliver the possession of goods, in order to transfer the title, where the goods are exempt from attachment and execution. It is held that there is no fraud on creditors to retain the possession of such goods, because the creditors cannot levy on them and therefore have no interest in them.<sup>2</sup>

In the States, in which the retention of possession is held to be *prima facie* evidence of fraud, the authorities are divided on the question, whether the good or bad faith of the buyer as against the vendor's creditors or subsequent purchasers, is a question of law for the court, or of fact for the jury. Some of the courts hold it to be a question of law for the court,<sup>3</sup> whereas others maintain that it is a question of fact for the jury.<sup>4</sup> Probably the best rule is,

<sup>1</sup> *Latimer v. Batson*, 4 Barn. & C. 652; *Leonard v. Baker*, 1 Maule & S. 251; *Watkins v. Birch*, 4 Taunt. 323; *Jezeph v. Ingram*, 8 Taunt. 838; *Hanford v. Obrecht*, 49 Ill. 146; *Lothrop v. Wightman*, 5 Wright, 297; *Myers v. Harvey*, 2 Pa. St. 478; *Walter v. Gement*, 13 Pa. St. 515; *Craig's Appeal*, 77 Pa. St. 448; *Maynes v. Atwater*, 88 Pa. St. 496; *Smith v. Crisman*, 91 Pa. St. 428; *Bisbing v. Third Nat. Bank*, 93 Pa. St. 79. But see, *contra*, *Fonde v. Gross*, 15 Wend. 628; *Gardenier v. Tubbs*, 21 Wend. 169; *Stinson v. Wrigley*, 86 N. Y. 332. See, also, *Wordall v. Smith*, 1 Camp. 332; *Ranney v. Moody*, 6 Up. Can. Com. Pl. 471.

<sup>2</sup> *Potter v. Smith*, 4 Conn. 455; *Foster v. McGregor*, 11 Vt. 595. But see, *contra*, *Barton v. Brown*, 68 Cal. 11, on the ground that the right of exemption is a personal privilege, which is waived if it is not claimed by the debtor.

<sup>3</sup> See *Griswold v. Shelden*, 4 N. Y. 501; *Edgell v. Hart*, 9 N. Y. 2, 6; *Russell v. Winne*, 57 N. Y. 591; *Tennessee Bank v. Ebbert*, 9 Helsk. 153; *Collins v. Meyers*, 16 Ohio St. 547; *Coburn v. Pickering*, 3 N. H. 415; *Trash v. Bowers*, 4 N. H. 309; *Sumner v. Dalton*, 88 N. H. 295; *Stow v. Taft*, 38 N. H. 445; *Cooledge v. Melvin*, 42 N. H. 510; *Lang v. Stockwell*, 56 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Crawford v. Fonistall*, 57 N. H. 102; *Plalsted v. Holmes*, 58 N. H. 293.

<sup>4</sup> *Scott v. Alford*, 53 Tex. 82; *Gay v. Bidwell*, 7 Mich. 519; *Brett v. Carter*, 2 Low. C. C. 458; *Peck v. Land*, 2 Kelly, 1; *Fleming v. Townsend*, 6 Ga. 103, 104; *Rose v. Colter*, 76 Ind. 590; *Mohter v. Robinson*, 40 Mich. 200; *Blackman v. Wheaton*, 13 Minn. 326; *Robinson v. Uhl*, 6 Neb. 333; *Densmore v. Tomer*, 11 Neb. 118; *Hanford v. Archer*, 4 Hill, 271; *Mitchell*

that it is a mixed question of law and fact; a question of law as to the existence or absence of a presumption of fraud, and a question of fact, as to whether the evidence in favor of good faith establishes a rebuttal of the presumption of fraud.<sup>1</sup>

In the States, in which the presumption of fraud is conclusive, it is generally held to be a question of fact for the jury whether there has been a sufficient delivery.<sup>2</sup>

What constitutes a sufficient delivery to be good against creditors and subsequent purchasers, is discussed in a subsequent chapter.<sup>3</sup>

Mere delay in the delivery of the possession is ordinarily not considered fraudulent as to creditors, as long as delivery is actually made before attachment. Until attachment, the debtor has done nothing to the injury of the creditor, on which to claim an avoidance of the sale.<sup>4</sup>

*v. West*, 55 N. Y. 107; *May v. Walter*, 56 N. Y. 8; *Blant v. Gabler*, 77 N. Y. 461; *Rea v. Alexander*, 5 Ind. 644; *Boone v. Hardle*, 83 N. C. 470.

<sup>1</sup> See the New York cases. See, also, *Brooks v. Powers*, 15 Mass. 244; *Bartlett v. Williams*, 1 Pick. 288; *Shumway v. Ritter*, 8 Pick. 443; *Shurtleff v. Willard*, 19 Pick. 202; *Hardy v. Potter*, 10 Gray, 89; *Ingalls v. Herrick*, 108 Mass. 851.

<sup>2</sup> *Weber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632; *Hughes v. Cory*, 20 Iowa, 399; *Lake v. Morris*, 30 Conn. 201; *Webster v. Peck*, 31 Conn. 495; *Clow v. Woods*, 5 S. & R. 275; *Evans v. Scott*, 89 Pa. St. 186; *Rothschild v. Rowe*, 44 Vt. 389; *Hesthal v. Myles*, 53 Cal. 623. But the court may refuse to give the question to the jury, where there is no evidence of a change of possession. *Rothschild v. Rowe*, 44 Vt. 389.

<sup>3</sup> See *post*, § 106.

<sup>4</sup> *Gilbert v. Decker*, 53 Conn. 401; *Calkins v. Lockwood*, 16 Conn. 276; *Hall v. Gaylor*, 37 Conn. 550; *Bartlett v. Williams*, 1 Pick. 288; *Shumway v. Rutter*, 8 Pick. 447; *Blake v. Graves*, 18 Iowa, 312; *Clute v. Steele*, 6 Nev. 335; *Kendall v. Simpson*, 12 Vt. 515; *Coty v. Barnes*, *Cruikshanks v. Coggs*, 26 Ill. 366; *Frank v. Miner*, 50 Ill. 455; *Berry v. Ensell*, 2 Gratt. 333; *Snyder v. Gee*, 4 Leigh, 535; *Wilson v. Leslie*, 20 Ohio, 389; *Brown v. Webb*, 20 Ohio, 389. In New York the statute calls for an immediate delivery, and so likewise in Minnesota, Nebraska, and Wisconsin.

In Missouri, the delivery must be made within a reasonable time after



§ 85. **Delivery without transfer of title — Reservation of *jus disponendi* — Prepayment of price.** — Ordinarily, the delivery does operate as a transfer of the title from the vendor to the vendee; for it is presumed that the parties intended by a transfer of possession to transfer the title also. But this presumption is not conclusive; and is always rebutted by evidence of an express intention to the contrary. The common cases are those in which the vendor reserves to himself the title, although the possession is delivered to the vendee, until the price is paid. And these cases may be divided into two classes, those in which the delivery is to the vendee himself, and those in which the delivery is to a common carrier.

Where the sale is a cash transaction, the parties are presumed to require prepayment of the price before there is to be any transfer of title or possession. If the goods are delivered to the vendee, in the absence of an express agreement to the contrary, the prepayment of price is presumed to have been waived, and the vendee acquires title on delivery.<sup>1</sup> But if the parties have expressly agreed, on delivery of the goods to the vendee, that the title shall not pass until payment of the price, the delivery will not affect the title in the vendor. The vendor still retains the title until payment of the price;<sup>2</sup> and if the price be not paid in

the sale. *Claffin v. Rosenberg*, 42 Mo. 439; 43 Mo. 539; *Bishop v. O'Connell*, 56 Mo. 158; *Burgert v. Borchert*, 59 Mo. 80; *Wright v. McCormick*, 67 Mo. 626.

<sup>1</sup> *Carlton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, 6 Pick. 262; *Farlow v. Ellis*, 15 Gray, 229; *Hammett v. Linneman*, 48 N. Y. 399; *Bowen v. Buck*, 13 Pa. St. 146; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Goodwin v. Boston, &c., R. R. Co.*, 111 Mass. 487; *Scudder v. Bradbury*, 106 Mass. 422; *Freeman v. Nichols*, 116 Mass. 309; *Haskins v. Warren*, 115 Mass. 514; *Mixey v. Cook*, 81 Me. 340.

<sup>2</sup> *Coggil v. Hartford, &c., R. R. Co.*, 8 Gray, 545; *Sargent v. Metcalf*, 5 Gray, 306; *Blanchard v. Child*, 7 Gray, 155; *Burbank v. Crooker*, 7 Gray, 158; *Deshon v. Bigelow*, 8 Gray, 159; *Hirschorn v. Canney*, 98 Mass. 150; *Zuchtmann v. Roberts*, 109 Mass. 53; *Benner v. Puffer*, 114 Mass. 373; *Armour v. Pecker*, 123 Mass. 145; *Chase v. Pike*, 125 Mass.

accordance with the terms of the contract, at the time agreed upon, or within a reasonable time, if no time is stipulated, the vendor can recover possession of the goods.<sup>1</sup>

The other cases of delivery without transfer of title, are where the goods are delivered to a common carrier for transportation to the vendee. The general rule is that where the goods have been delivered, with the express or implied consent of the vendee, to a common carrier for transportation to the purchaser, the delivery to the common carrier passes the title, so that the risk of loss in the course of transit falls on the vendee.<sup>2</sup> But this is not the case where

117; *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311; *Behren v. O'Donnell*, 34 N. J. L. 408; *Turner v. Moore*, 8 Atl. Rep. (Vt.) 467; *Bush v. Bender*, 113 Pa. St. 94; 4 Atl. Rep. 213; *Bishop v. Shillito*, 2 Barn. & Ald. 329 n; *Godts v. Rose*, 17 C. B. 239; *Brandt v. Bowlby*, 2 B. & Adol. 932; *Porter v. Pettingill*, 12 N. H. 299; *Paul v. Reed*, 52 N. H. 136; *Forbes v. Marsh*, 15 Conn. 384; *Henderson v. Lanck*, 21 Pa. St. 350; *Littel v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24; *Fisfield v. Elmes*, 25 Mich. 48; *Cobb v. Tufts*, 2 Tex. App. (Civ. Cas.), § 152; *Clark v. Wells*, 45 Vt. 4 (12 Am. Rep. 187); *Duncans v. Stone*, 45 Vt. 118; *Tyler v. Freeman*, 3 Cush. 261; *Whitney v. Eaton*, 15 Gray, 225; *Morris v. Rexford*, 18 N. Y. 552; *Hasbrouch v. Lounsbury*, 26 N. Y. 598; *Thompson v. Ray*, 46 Ala. 224; *Shireman v. Jackson*, 14 Ind. 459.

<sup>1</sup> *Ayer v. Bartlett*, 9 Pick. 156; *Reed v. Upton*, 10 Pick. 522; *Barrett v. Prichard*, 2 Pick. 512; *Whitwell v. Vincent*, 4 Pick. 449; *Booraem v. Crane*, 103 Mass. 522. See *post*, § 206, Chapter on Conditional Sales.

<sup>2</sup> *Burton v. Baird*, 44 Ark. 556; *State v. Carl*, 43 Ark. 353; *Magruder v. Gage*, 33 Md. 344 (3 Am. Rep. 177); *Ranney v. Higby*, 5 Wis. 62; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Hall v. Gaylor*, 37 Conn. 550; *Perkins v. Eckert*, 55 Cal. 400; *Cross v. O'Donnell*, 44 N. Y. 661; *Waite v. Baker*, 2 Ex. 1; *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomons*, 3 B. & P. 582; *London & Northwestern Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J. Ex. 92; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Cork Distilleries Co. v. Great Southern R. R. Co.*, L. R. 7 H. L. 269; *Bradford v. Marbury*, 12 Ala. 520 (46 Am. Dec. 264); *Hobart v. Littlefield*, 13 R. I. 341, 342; *Ludlow v. Bowne*, 1 Johns. 115; *Garland v. Lane*, 46 N. H. 248; *Hunter v. Wright*, 12 Allen, 548; *Sarbecker v. State*, 65 Wis. 171 (56 Am. Rep. 624); *Ranney v. Higby*, 4 Wis. 154; *Somers v. McLaughlin*, 57 Wis. 364; *Janney v. Sleeper*, 30 Minn. 473; *Garbracht v. Com.* 96 Pa. St. 449 (42 Am. Rep. 550); *Finch v. Mansfield*, 97 Mass. 89; *Abberger v. Marin*, 102 Mass. 70; *Brockway v. Maloney*, 102 Mass. 308; *Dolan v. Green*, 110 Mass. 322; *Frank v. Hoey*, 128 Mass. 263; *Tegler v. Shipman*, 38 Iowa, 194 (11 Am.

in the delivery of the goods to the common carrier the vendor receives a bill of lading, in which the common carrier obligates himself to deliver the goods to the order of the consignor. The execution and receipt of such a bill of lading are taken as presumptive evidence of an intention to reserve the title from the vendee, or consignee, and a retention of the *jus disponendi* in the consignor. It is not simply a vendor's lien, which is reserved in such a case, but the absolute right of property in the goods, which enables the vendor freely to dispose of the goods to others.<sup>1</sup> The bill of lading, in all such cases, is taken as the symbol of the property, so that a transfer of the bill of lading operates as the transfer of the goods themselves.<sup>2</sup> And the obligation of the common carrier is to deliver the goods to the assignee of the bill of lading.<sup>3</sup>

The title to the goods may be reserved to the consignor, in such a case, even though the goods have been delivered to the buyer's ship. In such cases, the presumption is that the title passes to the purchaser on delivery to the

Rep. 118); *Shuenfeldt v. Junkerman*, 20 Fed. Rep. 357; *Hill v. Spear*, 50 N. H. 253 (9 Am. Rep. 205); *Boothby v. Plaisted*, 51 N. H. 436 (12 Am. Rep. 140); *State v. O'Neill*, 58 Vt. 140 (56 Am. Rep. 557).

<sup>1</sup> *Wilmshurst v. Bowker*, 2 M. & G. 792; *Ellershaw v. Magulac*, 6 Ex. 570; *Van Casteel v. Booker*, 2 Ex. 691; *Shepherd v. Harrison*, L. R. 4 Q. B. 196; Ex. Ch. 493; L. R. 5 H. L. 116; *Ogg v. Shuter*, 1 C. P. D. 47, C. A.; Ex parte *Bauner*, 2 Ch. D. 78 C. A.; *Waite v. Baker*, 2 Ex. 1; *Jenkyns v. Brown*, 14 Q. B. 496; 19 L. J. Q. B. 286; *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *St. Joze Indiano*, 1 Wheat. 208; *Dows v. Nat. Exch. Bank*, 91 U. S. 618; *Hobart v. Littlefield*, 13 R. I. 341; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Farmers', &c., Bank v. Logan*, 74 N. Y. 568; *First Nat. Bank v. Crocker*, 111 Mass. 163, 167; *Reynolds v. Scott*, Cal., 4 Pac. Rep. 346; *Mason v. Greatwestern Ry. Co.*, 31 Up. Can. Q. B. 78.

<sup>2</sup> *Bank of Rochester v. Jones*, 4 Comst. 497; *Marine Bank v. Wright*, 48 N. Y. 1; *Mich. Cent. R. R. Co. v. Phillips*, 60 Ill. 190; *First Nat. Bank v. Crockery*, 111 Mass. 163; *First Nat. Bank v. Bayley*, 115 Mass. 230; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Schumacher v. Eby*, 24 Pa. St. 521.

<sup>3</sup> See cases cited in last two notes.

master of his ship.<sup>1</sup> But the vendor may by special terms reserve to himself the *jus disponendi*, even where the bill of lading shows that the goods are to be free of freight, because they are the property of the shipowner.<sup>2</sup>

It is quite common for the bill of lading to be attached to, and to pass with the transfer of, a bill of exchange drawn by the vendor on the vendee, which is negotiated, and upon payment or acceptance of the bill of exchange, the bill of lading is to be delivered to the vendee. Where the bill of exchange is payable on demand or at sight, the holder of the bill of lading cannot deliver it to the vendee, until the bill of exchange is both accepted and paid, provided that the consignor would have had the right to withhold the bill of lading until the purchase money has been paid.<sup>3</sup> But where the bill of exchange is payable in the future, in the absence of a special agreement, the bill of lading is to be delivered to the vendee upon his acceptance of the bill of exchange according to its tenor; and the holder cannot insist upon holding it until the bill of exchange is paid. The drawee of the bill of exchange may refuse to accept, unless the bill of lading is surrendered to him.<sup>4</sup>

<sup>1</sup> *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. D. 164, 172.

<sup>2</sup> *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Moakes v. Nicholson*, 19 C. B. N. S. 290; 34 L. J. C. P. 273; *Fluke v. Fletcher*, 18 C. B. N. S. 403; 34 L. J. C. P. 146; *Gamm v. Lyrie*, 33 L. J. Q. B. 97; 6 B. & S. 298; 34 L. J. Q. B. 124; *Ellenhan v. Magniac*, 6 Ex. 570; *Van Casteel v. Booker*, 2 Ex. 691; *Schotsman v. Lancashire, &c., Ry. Co.*, 2 Ch. 332.

<sup>3</sup> *Heiskell v. Farmers', &c., Bank*, 89 Pa. St. 225; *First Nat. Bank v. Bayley*, 115 Mass. 228; *Emery v. Irving Nat. Bank*, 25 Ohio St. 255; *National Bank v. Merchants' Bank*, 100 Mass. 104; *Dows v. Nat. Exch. Bank*, 91 U. S. 618; *Marine Bank v. Wright*, 48 N. Y. 1.

<sup>4</sup> *Lanfeur v. Blossom*, 1 La. Ann. 148; *Marine Bank v. Wright*, 48 N. Y. 1. In *National Bank v. Merchant's Bank*, 91 U. S., Strong, J., said: "It seems to be a natural inference, indeed a necessary implication, from a time draft accompanied by a bill of lading indorsed in blank, that the merchandise (which in this case was cotton), specified in the

If the bill of lading, attached to a bill of exchange, is sent direct to the vendee, the delivery of the bill is nevertheless conditional and the vendee cannot retain the bill of lading, without honoring the draft. He does not acquire title to the goods, until he has honored the bill of exchange.<sup>1</sup> In all such cases, if the vendee is by the terms of the bill of lading the consignee, he takes the goods into his possession, subject to the right of the holder of the bill of exchange to demand payment. The consignee must honor the bill of exchange or surrender the goods.<sup>2</sup> If the carrier delivers the goods to the vendee in contradiction of the terms of the bill of lading, *i. e.*, where the bill of lading provides for the delivery of the

bill was sold on credit, to be paid for by the accepted draft, or that the draft is a demand for an advance on the shipment, or that the transaction is a consignment to be sold by the drawee on account of the shipper. It is difficult to conceive of any other meaning the instrument can have. If so, in the absence of any express agreement to the contrary, the acceptor, if a purchaser, is clearly entitled to the possession of the goods on his accepting the bill, and thus giving the vendor a completed contract for payment. \* \* \* If the inference to be drawn from a time draft accompanied by a bill of lading is, not that it evidences a credit sale, but a request for advances on the credit of the consignment, the consequence is the same. Perhaps it is even more apparent. It plainly is that the acceptance is not asked on the credit of the drawer of the draft, but on the faith of the consignment. \* \* \* Nor can it make any difference that the draft with the bill of lading has been sent (as in this case) 'for collection.' That instruction means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency."

<sup>1</sup> *Shepherd v. Harrison*, L. R. 4 Q. B. 197; 5 H. L. 116; *Indiana, &c., Bank v. Colgate*, 4 Daly, 41; *Marine Bank v. Wright*, 48 N. Y. 1; *Ogg v. Shuter*, 1 C. P. D. 47, C. A.

<sup>2</sup> *Emery v. Irving Nat. Bank*, 25 Ohio St. 255; *Dows v. Nat. Exch. Bank*, 91 U. S. 681; *National Bank v. Merchants' Bank*, 91 U. S. 98; *Heiskell v. Farmers', &c., Bank*, 89 Pa. St. 155. The consignee could not in that case retain the purchase money in liquidation of a debt due to him by the consignor. *Emery v. Irving Nat. Bank*, 25 Ohio St. 255. See *Jenkins v. Brown*, 15 Q. B. 496; *Schorman v. R. R. Co.*, L. R. 2 Ch. App. 336; *Turner v. Trustees Liverpool Docks*, 6 Exch. 548; *Ellerslaw v. Magniac*, 6 Exch. 570.

goods only on payment of the bill of exchange, neither the vendee nor any innocent purchaser from him will acquire title to the same; and the consignee of the bill of lading with draft attached may recover the goods from any one who has possession of them.<sup>1</sup>

But, although the vendor may intend to retain control of the goods, until the bill of exchange for the purchase money is paid by the purchaser, if he sends him an indorsed bill of lading through the mail, without attaching it to the bill of exchange, the title passes to the vendee unconditionally, and the vendor cannot recover the goods, if the vendee should refuse to honor the bill of exchange.<sup>2</sup> Whenever goods are delivered, with the reservation of the title until some condition, as the payment of the price, is performed, the relation of the parties becomes somewhat peculiar. The seller retains his right to sell, and his creditors their right to attach, the property, subject to the buyer's right to acquire the absolute title by the performance of the condition;<sup>3</sup> while the buyer acquires by the delivery of the goods to him, such a conditional right of property, as he may transfer it to another, the sub-vendee, acquiring the absolute right of property by the performance of the condition.<sup>4</sup>

§ 86. **Sale of specific goods unconditionally.** — If one contracts to sell specific goods, without any condition whatever, the presumption is that the title to the goods passes

<sup>1</sup> *Heiskell v. Farmers', &c., Bank*, 89 Pa. St. 155. See also *Dows v. Nat. Exch. Bank*, 91 U. S. 631; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Seymour v. Norton*, 105 U. S. 272; *Stottenwerck v. Thacher*, 115 Mass. 224; *Alderman v. Eastern R. R. Co.*, 511 Mass. 233.

<sup>2</sup> *Ex parte Banner*, 2 Ch. D. 78 C. A.

<sup>3</sup> *Burnell v. Marvin*, 44 Vt. 277; *McMillen v. Larned*, 41 Mich. 521; *Everett v. Hall*, 67 Me. 497; *Hubbard v. Bliss*, 12 Allen, 590.

<sup>4</sup> *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255; *Currier v. Knapp*, 117 Mass. 324; *Chase v. Ingalls*, 122 Mass. 381; *Carpenter v. Scott*, 18 R. I. 477.

immediately, and without any further act of the parties. This is universally true, where the price has been paid, or the goods have been expressly sold on credit. But if the contract is a cash transaction, prepayment of the price is a condition precedent, according to all the authorities, to the transfer of possession, and, according to the weight of American authority, to the transfer of title also. This is the case, whether the prepayment of the price is express,<sup>1</sup> or implied.<sup>2</sup> But in England, according to the later authorities, the title to a specific article is held to pass on the completion of the contract, without prepayment of price, notwithstanding it is a cash transaction, and the vendor has the right to withhold the possession, until the price is paid.<sup>3</sup> It is difficult to see how it can be presumed that the parties intended to pass title immediately on the making of the contract, when the vendor may and does require prepayment of the price before delivering the goods. It would seem to be more reasonable to hold that the vendor intended to keep the goods as his own, until he received the price. The intention to pass title, and yet to retain possession of the goods, until the price is paid, is too refined an idea to make it likely, in the absence of an express agreement, that the average tradesman contemplated the transaction to have

<sup>1</sup> *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 Pick. 156; *Reed v. Upton*, 10 Pick. 522; *Booraem v. Crane*, 103 Mass. 522.

<sup>2</sup> *Fishback v. Van Dusen*, 33 Minn. 111; 33 Am. Law Reg. 506, note.

<sup>3</sup> *Simmons v. Swift*, 5 B. & C. 862, Bayley, J.: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take away without paying the price." See, also, *Dixon v. Yates*, 5 A. & E. 313; *Hinde v. Whitehouse*, 7 East, 558; *Martindale v. Smith*, 1 Q. B. 389; *Gilmour v. Supple*, 11 Mo. P. C. 551; *Wood v. Bell*, 6 E. & B. 355; 25 L. J. Q. B. 148; Ex. Ch. 321; *Farley v. Bates*, 2 H. & C. 200; 33 L. J. Ex. 43; *Tarling v. Baxter*, 6 C. & C. 360; *Spartall v. Bentecke*, 10 C. B. 212; *Calcutta Company v. De Mattos*, 32 L. J. Q. B. 322; *Chambers v. Miller*, 10 C. B. (N. S.) 125; 32 L. J. C. P. 30; *Joyce v. Swan*, 17 C. B. (N. S.) 84.

that effect. But, generally, the requirement of prepayment of the price is implied from the fact that there is no stated time of payment, only as long as the vendor does not part with the possession of the goods. If he delivers the goods to the vendee, he is presumed, in the absence of an express reservation, to have waived the condition of prepayment.<sup>1</sup>

§ 87. **Sale of specific chattels conditionally.** — If the sale of specific chattels is subjected to any condition precedent, the title does not pass until the condition is performed. And the title will revert upon the breach of a condition subsequent. The general subject of conditions is treated elsewhere.<sup>2</sup> Reference is here had only to those conditional sales, in which the vendor has something to do with or concerning the goods, before they are ready for delivery. The general rule is, that when the vendor has to prepare the goods for delivery, the title does not pass to the vendee, until they are so prepared for delivery. The title does not pass before they are manufactured or as long as the goods are in an incomplete condition.<sup>3</sup>

<sup>1</sup> *Smith v. Dennie*, 6 Pick. 262; *Carlton v. Sumner*, 15 Gray, 229; *Hammett v. Lineman*, 48 N. Y. 399; *Mixer v. Cook*, 31 Me. 340; *Farlow v. Ellis*, 15 Gray, 229; *Scudder v. Bradbury*, 106 Mass. 422; *Goodwin v. Boston, etc., R. R. Co.*, 111 Mass. 487; *Haskins v. Warren*, 115 Mass. 314; *Freeman v. Nichols*, 116 Mass. 309.

<sup>2</sup> See *post*, Chapter XV.

<sup>3</sup> *Foster v. Ropes*, 111 Mass. 10 (fish to dry); *Hale v. Huntley*, 21 Vt. 147 (bricks to be burned); *Gibbs v. Benjamin*, 45 Vt. 124; *Fuller v. Bean*, 34 N. H. 290; *Gilbert v. N. Y. Cent. R. R. Co.*, 4 Hun, 378 (goods to be delivered); *Smith v. Sparkman*, 55 Miss. 649 (cotton to be ginned or baled); *Pritchett v. Jones*, 4 Rawle, 260 (do.); *Screws v. Roach*, 22 Ala. 675 (do.); *Comfort v. Klersted*, 26 Barb. 472 (shingles to be manufactured); *Hyde v. Lathrop*, 2 Abb. App. Cas. 436; *Thompson v. Conover*, 32 N. J. L. 466; *Dunning v. Gordon*, 4 Up. Can. Q. B. 399; *Anderson v. Morice*, 1 App. Cas. 713; *Exch. L. R.* 10 C. P. 609 (rice to be loaded in ship); *Higgins v. Cheesman*, 9 Pick. 10 (bill of sale to be made out and delivered to the vendee); *Acraman v. Monis*, 8 C. B. 449 (trees to be trimmed); *Langton v. Higgins*, 28 L. J. Ex. 252; 4 H. & N. 402; *Rugg v. Minett*, 11 East, 210.



It is also held that if the goods are to be inspected, measured, weighed or counted before delivery in order to ascertain the price, the title to the goods does not ordinarily pass until they have been measured, weighed or counted.<sup>1</sup>

But where the parties have intended that the title shall pass immediately, and before the completion of the preparations for delivery and the intention is duly manifested in the terms of the contract, the title will pass notwithstanding some thing is still to be done by the vendor, before the goods are ready for delivery.<sup>2</sup> And it has been held in England that, in the case of the manufacture of ships, the agreement to pay installments of the price at successive stages in the course of their building is evidence of an intention to pass the title to the ship before its completion.<sup>3</sup>

<sup>1</sup> *Elgee Cotton Cases*, 22 Wall. 180; *Robertson v. Strickland*, 28 Up. Can. Q. B. 221; *O'Neil v. McIlmoyle*, 84 Up. Can. Q. B. 236; *Nicholson v. Taylor*, 81 Pa. St. 128; *Frost v. Woodruff*, 54 Ill. 156; *Pike v. Vaughn*, 39 Wis. 499; *Kein v. Tupper*, 52 N. Y. 550; *Devane v. Fennell*, 2 Ired. 87; *Allman v. Davis*, 2 Ired. 12; *Davis v. Hill*, 8 N. H. 382; *Gilman v. Hill*, 86 N. H. 311; *Abat v. Atkinson*, 21 La. An. 414; *Nesbit v. Burry*, 25 Pa. St. 209; *Joyce v. Adams* 8 N. Y. 291; *Strauss v. Ross*, 25 Ind. 300; *Lester v. East*, 49 Ind. 588; *McDonald v. Hewett*, 15 Johns. 349; *Rapelye v. Mackie*, 6 Cow. 250; *Outwater v. Dodge*, 7 Cow. 85; *McClung v. Kelly*, 21 Iowa, 508; *Jennings v. Flanagan*, 5 Dana, 217; *Sherwin v. Mudge*, 127 Mass. 547; *McDonough v. Sutton*, 85 Mich. 1; *Hanson v. Meyer*, 6 East, 614; *Zagory v. Farrell*, 2 Camp. 240; *Summons v. Swift*, 5 B. & C. 857; *Logan v. LeMesurier*, Moo. P. C. 116; *Gilmour v. Supple*, 11 Moo. P. C. 551; *Tansley v. Turner*, 2 Scott, 288; *Cooper v. Bill*, 34 L. J. Ex. 161; 3 H. & C. 722; *Wallace v. Breeds*, 13 East, 522; *Bush v. Davis*, 2 M. & S. 397; *Austen v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyss*, 4 Camp. 287; *Boswell v. Kilborn*, 15 Moo. P. C. 309. This is especially true where it is a cash transaction. *Hoffman v. Calver*, 7 Bradw. 450; *Pfistner v. Bird*, 48 Mich. 14.

<sup>2</sup> See *Lynch v. O'Donnell*, 127 Mass. 311; *Weld v. Came*, 98 Mass. 152; *Boynton v. Veazle*, 24 Me. 286; *Dyer v. Libby*, 61 Me. 45; *Terry v. Wheeler*, 25 N. Y. 520; *Underhill v. Boom Co.*, 40 Mich. 660; *Muskegon Boom Co. v. Underhill*, 43 Mich. 629.

<sup>3</sup> *Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 A. & E. 448; *Read v. Fairbanks*, 13 C. B. 692; 22 L. J. C. P. 206; *Laidler v. Burlinson*, 2 M. & W. 602; *Wood v. Bell*, 5 E. & B. 772; 25 L. J. Q. B. 148; *s. c. Ex.*

But in the United States, the English cases are not followed, the American cases holding that something more is needed than an agreement to pay installments of the price in the course of manufacture, in order to show an intention to pass title immediately.<sup>1</sup> The American authorities, however, recognize the power of the parties to provide for the transfer of the title *pro tanto*, in the course of manufacture, and on the payment of installments of the price, if this intention is clearly manifested.<sup>2</sup> It has also been held that the fact, that the goods have not been weighed, counted or measured, will only prevent the title from passing when it is not the intention of the parties to do otherwise; and while it is presumed that the title does not pass before the goods are weighed, measured or counted, where these things are to be done before delivery, and as preliminary to a cash payment, yet the title will pass on a delivery of the goods, although they have yet to be counted, measured or weighed, unless the parties show in the terms of their contract a contrary intention.<sup>3</sup> And it is held that

Ch. 6 E. & B. 355; 25 L. J. Q. B. 321. And this is also the case, in respect to the materials which have been prepared and fitted to a ship, but not yet actually attached. See *Woods v. Russell*, *supra*; *Goss v. Quinton*, 3 M. & G. 825; *Wood v. Bell*, *supra*. But not if the materials have not been fitted to, and thus constructively become a part of the ship. *Tripp v. Armitage*, 4 M. & W. 687; *Wood v. Bell*, 6 E. & B. 355; 25 L. J. Q. B. 321.

<sup>1</sup> *Briggs v. A Light Boat*, 89 Mass. 287; *Williams v. Jackman*, 16 Gray, 514; *Andrews v. Durant*, 11 N. Y. 35.

<sup>2</sup> See *Clarkson v. Stevens*, 106 U. S. 505; *Elliott v. Edwards*, 35 N. J. L. 265; 36 N. J. L. 449; *Scull v. Shakespear*, 75 Pa. St. 297; *Coursin's Appeal*, 79 Pa. St. 220; *Lang's Appeal*, 81 Pa. St. 18; *Green v. Hall*, 1 Houst. 506; *Wright v. Tetlow*, 99 Mass. 397. But see *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522; *Bank of Upper Canada v. Killaly*, 21 Up. Can. Q. B. 9; *Scudder v. Calais Steamboat Co.*, Cliff. 370.

<sup>3</sup> *Scott v. Wells*, 6 Watts & S. 357; *Dennis v. Alexander*, 3 Pa. St. 51; *Bigley v. Risher*, 63 Pa. St. 155; *Southwestern Freight Co. v. Stanard*, 44 Mo. 71; *Ober v. Carson*, 62 Mo. 209; *Crofoot v. Bennett*, 2 N. Y. 258; *Tyler v. Strang*, 21 Barb. 198; *Bradley v. Wheeler*, 44 N. Y. 495; *Burrows v. Whitaker*, 71 N. Y. 291; *Kaufman v. Stone*, 25 Ark. 337;

the title passes on delivery to the common carrier, notwithstanding the goods are to be weighed or measured by the buyer, in order to ascertain the price, where the contract expressly provides that the goods shall be shipped at the risk of the buyer.<sup>1</sup> It is also presumed, when the goods are delivered without being measured or weighed, that the buyer is expected to do what is necessary to ascertain the quantity of the goods.<sup>2</sup> But this is only a debatable presumption; and if it is shown that the parties do not intend to pass title until the quantity of goods has been ascertained, the title will not pass sooner.<sup>3</sup>

Where the buyer is required to do anything as a condition precedent, it follows of course that the title does not pass until the condition is performed. The most common example is the prepayment of the price. Before delivery, the title will not pass until the price is paid, wherever the contract calls for the prepayment of the price.<sup>4</sup> And so,

*Bell v. Farrar*, 41 Ill. 400; *Magee v. Billingsley*, 3 Ala. 679; *Chambles v. McKenzie*, 81 Ark. 155; *Riddle v. Varnum*, 20 Pick. 280; *Cashman v. Holyoke*, 34 Me. 289; *Macomber v. Parker*, 13 Pick. 175; *Lahlman v. Mills*, 3 Strobb. 385; *Frazier v. Hilliard*, 2 Strobb. 309; *Adams Mining Co. v. Senter*, 26 Mich. 74; *Allen v. Maury*, 66 Ala. 10; *Upton v. Holmes*, 51 Conn. 500; *Odell v. Boston & Maine R. R. Co.*, 109 Mass. 50; *Leckell v. Scott*, 66 Ill. 106; *Baldwin v. Doubleday*, Vt. (4 N. E. Rep. 124). See also *Young v. Matthews*, L. R. 2 C. P. 127; *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118; *Oliphant v. Baker*, 5 Denio, 379.

<sup>1</sup> *Castle v. Playford*, L. R. 5 Ex. 165; 7 Ex. 98; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Fragano v. Long*, 4 B. & C. 219.

<sup>2</sup> *Cunningham v. Ashbrook*, 20 Mo. 558; *Leonard v. Davis*, 1 Black, 476; *Haxall v. Willis*, 15 Gratt. 434; *Weld v. Cutler*, 2 Gray, 195; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *Brewer v. Michigan Salt Association*, 47 Mich. 526; *Martin v. Hurlbut*, 9 Minn. 142; *Burroughs v. Whitaker*, 71 N. Y. 291; *Bogy v. Rhodes*, 4 Greene (Iowa), 183; *Sedgwick v. Cottingham*, 54 Iowa, 512; *Whitcomb v. Whitney*, 24 Mich. 486; *Sewell v. Eaton*, 6 Wis. 490; *Morrow v. Reed*, 30 Wis. 81; *Morgan v. Perkins*, 1 Jones (N. C.) 171.

<sup>3</sup> *Ward v. Shaw*, 7 Wend. 404. See *Andrew v. Dietrich*, 14 Wend. 36.

<sup>4</sup> *Bishop v. Shillito*, 2 B. & Ald. 329; *Brandt v. Bowby*, 2 B. & Ad. 932;

also, where the goods have been delivered to the vendee, the vendor having the right to retake the goods from the vendee, if the price is not paid. This is quite common at present in the contracts of sale of merchandise on time, the terms being that the vendee does not acquire title until the price is paid in full.<sup>1</sup> But even where the buyer is required to do something with the goods, it is still a question of intention, whether the title passes before or after he does what is required of him.<sup>2</sup> For the same reasons, the title does not pass on delivery of the goods to the vendee, where they are sent subject to approval, and the right to return them, if they do not suit.<sup>3</sup>

§ 88. Sale of goods not specific. — Before one can acquire the title to any kind of property, it must be definitely ascertained and described; *i.e.*, the subject-matter of the sale must be capable of identification. As long as there is simply an obligation to sell a given quantity of a thing, without specifying what lot or parcel of the thing shall pass by the sale, the contract must remain executory. Hence where one agrees to sell a given quantity of a thing, generally, and without reference to

*Shepherd v. Harrison*, L. R. 4 Q. B. 196, 498; L. R. 4 H. L. 116; *Barrow v. Coles*, 3 Camp. 92; *Mires v. Solesby*, 2 Mod. 248.

<sup>1</sup> *Ex parte Crawcour*, 9 Ch. D. 419, C. A.; *Ex parte Powell*, 1 Ch. D. 504, C. A.; *Crawcour v. Salter*, 18 Ch. D. 80, C. A.; *Barrett v. Pritchard*, 2 Pick. 512, *Whitwell v. Vincent*, 4 Pick. 449; *Ayer v. Bartlett*, 9 Pick. 156; *Reed v. Upton*, 10 Pick. 522; *Booraem v. Crane*, 108 Mass. 522; *Bauendahl v. Horr*, 7 Blatchf. 548. This is the case, also, where the vendor's creditors and subsequent purchasers claim the right to retake the goods. The title does not pass even as to them. *Coggill v. Hartford, &c.*, R. R. Co., 3 Gray, 545; *Sargent v. Metcalf*, 5 Gray, 806; *Blanchard v. Child*, 7 Gray, 155. But see, *ante*, § 85, for a full discussion of the passing of title where the prepayment of price is a condition precedent.

<sup>2</sup> *Turley v. Bates*, 2 H. & C. 200; *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Hinde v. Whitehouse*, 7 East, 558; *Kershaw v. Ogden*, 34 L. J. Ex. 159; 3 H. & C. 717.

<sup>3</sup> *Swain v. Shepherd*, 1 Mood. & Rob. 223. See *post*, §213, on Conditions.

any particular lot of goods, or a portion of a larger mass, no title passes, as a general rule, as long as the subject-matter of the sale has not been selected and set apart for the performance of the contract. For, until this is done, the subject-matter of the sale has not been individualized.<sup>1</sup> The authorities are quite unanimous that the title does not pass where the contract is for the sale of a quantity of goods, generally described, and without reference to any specific lot.<sup>2</sup> And, also, where the

<sup>1</sup> *Wallace v. Breeds*, 18 East, 522; *Busk v. Davis*, 2 M. & S. 397; *White v. Wilks*, 5 Taunt. 176; *Gillett v. Hill*, 2 C. & M. 530; *Austin v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *Brewer v. Smith*, 8 Greenl. 44; *Young v. Austin*, 6 Pick. 280; *Merrill v. Hunnewell*, 18 Pick. 213; *Woods v. McGee*, 7 Ohio, 467; *Dunlop v. Berry*, 4 Scam. 327; *Field v. Moore*, Hill & Denio, 418; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Pollock v. Fisher*, 1 Allen (N. B.) 515; *Stevens v. Eno*, 10 Barb. 95; *Waldo v. Belcher*, 11 Ired. 609; *Gardiner v. Suydam*, 7 N. Y. 357; *Scudder v. Worster*, 11 Cush. 573; *Ropes v. Lane*, 9 Allen, 510; *Cook v. Logan*, 7 Iowa, 142; *McDougall v. Elliott*, 20 Up. Can. Q. B. 299; *Ickington v. Richey*, 41 N. H. 275; *Fuller v. Bean*, 34 N. H. 290; *Warren v. Buckminster*, 24 N. H. 337; *Messer v. Woodman*, 23 N. H. 172; *Courtright v. Leonard*, 11 Iowa, 32; *Rosenthal v. Risley*, 11 Iowa, 541; *Balley v. Smith*, 43 N. H. 141; *Stone v. Peacock*, 35 Me. 385; *McLaughlin v. Piatl*, 27 Cal. 463; *Haldeman v. Duncan*, 51 Pa. St. 66; *Rodee v. Wade*, 47 Barb. 53; *Box v. Provincial Ins. Co.*, 15 Grant Ch. 337 (overruled in 18 Grant, 280); *Browning v. Hamilton*, 42 Ala. 484; *Baldwin v. McKay*, 41 Miss. 358; *Upham v. Dodd*, 24 Ark. 545; *Mobile Sav. Bank v. Fry*, 69 Ala. 350; *Thomas v. The State*, 37 Miss. 353; *Beller v. Block*, 19 Ark. 566; *Caruthers v. McGarvey*, 41 Cal. 15; *Keeler v. Goodwin*, 111 Mass. 490; *Foot v. Marsh*, 51 N. Y. 288; *Morrison v. Dingley*, 63 Me. 553; *Hahn v. Fredericks*, 30 Mich. 223; *Huntington v. Chisholm*, 61 Ga. 270; *Central R. R. Co. v. Burr*, 51 Ga. 553; *Ferguson v. Northern Bank*, 14 Bush, 555; *Balley v. Long*, 24 Kan. 90; *Williams v. Feineman*, 14 Kan. 238; *Howell v. Pugh*, 27 Kan. 702; *Cleveland v. Williams*, 29 Tex. 204; *Block v. Maas*, 65 Ala. 211; *Commercial Bank v. Gillette*, 90 Ind. 268; *Fry v. Mobile Sav. Bank*, 7b Ala. 473; *Ober v. Carson*, 62 Mo. 213; 6 Mo. App. 598; 9 Mo. App. 578; *Fitzpatrick v. Fain*, 3 Coldw. 15.

<sup>2</sup> *Bancher v. Warren*, 33 N. H. 133; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184; *Higgins v. Del. & Lack. R. R. Co.*, 51 N. Y. 288; 60 N. Y. 553; *McCandlish v. Newman*, 22 Pa. St. 460; *Winslow v. Leonard*, 24 Pa. St. 12; *Lewis v. Lofley*, 60 Ga. 559; *Pew v. Lawrence*, 27 Up. Can. C. P.

sale is of goods to be manufactured. The title does not pass until the goods have been manufactured and made ready for the delivery to the vendee.<sup>1</sup> But where the contract is for the sale of an unspecified portion of a larger mass, the American authorities exhibit a hopeless conflict.

It is maintained by some of the authorities that it cannot in this case become a question of intention when the title passes; for the vendee cannot get the title to any part of the goods, until that specific part has been identified and set apart.<sup>2</sup> This is, however, only true so far that the acquisition of a title *in severalty* is impossible, without a separation from the mass, whatever may have been the intention of the parties. But if the parties so intended, it is not at all impossible before separation from the mass to transfer a title *in common* to a part, thus making the transferee of a part a tenant in common with the other proprietors of the mass.<sup>3</sup> If, therefore, the intention of the parties to pass title to the goods before a separation from the greater mass be proven, there is no material obstacle in the way. But, except where the intention is express, it is difficult to prove it. It requires a strong array of facts, in evidence of a contrary intention, to rebut the presumption that in the ordinary contract of sale the parties intend to pass a title in severalty to the goods sold, instead of a title in common with others to the greater mass. The ordinary vendee does not expect to be-

402; *Winslow v. Leonard*, 24 Pa. St. 12; *Moss v. Meshen*, 8 Bush, 187; *Ormsby v. Machlin*, 20 Ohio St. 295; *May v. Hoaglan*, 9 Bush, 171; *Black v. Webb*, 20 Ohio, 304.

<sup>1</sup> *Nat. Bank v. Crowley*, 24 Mich. 492; *Ballentine v. Robinson*, 46 Pa. St. 177; *Moline Scale Co. v. Reed*, 52 Iowa, 307; *Higgins v. Murray*, 4 Hun, 565; 73 N. Y. 252; *Goddard v. Binney*, 115 Mass. 450.

<sup>2</sup> *Ferguson v. Northern Bank*, 14 Bush, 555, 566.

<sup>3</sup> *Kimberly v. Patchin*, 19 N. Y. 330; *Hoyt v. Hartford Ins. Co.*, 26 Hun, 416; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86; *Young v. Miles*, 20 Wis. 615; *Hurff v. Hires*, 39 N. J. L. 4; 40 N. J. L. 581; *Phillips v. Ocmulgee Mills*, 55 Ga. 634.

come a tenant in common with others of a greater quantity than what he bought. He expects to acquire what he bought as his own individual property. In most of the cases, in which the courts have held the title to have passed before separation and identification of the goods, some fact or circumstance has been present, from which may be inferred, more or less strongly, the intention to pass title immediately and to make the purchaser a tenant in common with others of the whole mass. But in almost every such instance, other cases will be cited in which the title was held not to pass, notwithstanding the presence of facts which had been held sufficient to support a contrary inference, the two classes of cases being altogether irreconcilable.

The first class of cases is composed of those, in which the goods are stored in some elevator in bulk, and the goods, such as grain, are not kept separate, but put into bins along with other grain of the same quality. In these cases, the elevator company does not obligate itself to return the identical grain which has been deposited, only grain of the same quantity and quality. The courts are not unanimous in their description of the relation of the elevator company to the deposited grain, some holding that the company becomes the proprietor of the entire mass, with an obligation to deliver to the depositors the grain called for by the warehouse receipts, while others maintain that the company is a bailee, and that the depositors become tenants in common of the entire mass of deposited grain.<sup>1</sup> It does not matter for the purposes of the present question which of these views as to the relation of the elevator company is sound, in any case, what the depositor sells is not a part of a specific quantity of grain, but a part of an incorporeal claim against another for a given amount of grain. From the nature of the transaction, one would be

<sup>1</sup> See *ante*, § 7.

irresistibly forced to the conclusion, that the parties expected the purchaser by the contract of sale to succeed in whole or in part to the incorporeal rights of the vendor.<sup>1</sup> And the same ruling has been applied to many other cases in which the goods were at the time of sale in the keeping of a warehouseman.<sup>2</sup>

It has also been held to be evidence of an intention to pass an immediate title in common, where the entire mass is delivered to the purchaser to enable him to select what comes to him.<sup>3</sup> So, also, where the price is prepaid in full,<sup>4</sup> where the parties stipulate that the goods will be *at the buyer's risk*,<sup>5</sup> where the buyer insures his goods,<sup>6</sup> and

<sup>1</sup> *Cushing v. Breed*, 14 Allen, 380; *Morrison v. Woodley*, 84 Ill. 192; *Dole v. Olmstead*, 36 Ill. 150; *McPherson v. Gale*, 40 Ill. 368; *Russell v. Carrington*, 42 N. Y. 118; *Lobdell v. Stowell*, 51 N. Y. 75. See *Sexton v. Graham*, 53 Iowa, 188; *German Nat. Bank v. Meadowcroft*, 4 Bradw. 680; *Rice v. Nixon*, 97 Ind. 97; *Schindler v. Westover*, 99 Ind. 895; *Lyon v. Lenon*, 106 Ind. 567; *Barker v. Bushnell*, 75 Ill. 220; *Broadwell v. Howard*, 77 Ill. 305; *Arthur v. Chicago, etc., Ry. Co.*, 61 Iowa, 648. See, also, *Kauffman v. Schilling*, 58 Mo. 218; *Andrews v. Richmond*, 34 Hun, 24; *Clark v. Griffiths*, 24 N. Y. 595; *Wooster v. Sherwood*, 25 N. Y. 278; *Foot v. Marsh*, 51 N. Y. 288; *Galloway v. Week*, 54 Wis. 604; *Hoffman v. King*, 58 Wis. 314. But, see, *contra*, *Cook v. Lagan*, 7 Iowa, 142, where plaintiffs were joint owners of a stock of wheat stored with defendant, and one of the defendants sold defendant twenty bushels. Held title did not pass. Although this is not an elevator case, the principle is the same.

<sup>2</sup> *Pleasants v. Pendleton*, 6 Rand. 478; *Horr v. Barker*, 8 Cal. 608; 11 Cal. 393; *Whitehouse v. Frost*, 12 East, 614; *Coffey v. Quebec Bank*, 20 Up. Can. C. P. 110; 20 Up. Can. C. P. 555; *Carpenter v. Graham*, 42 Mich. 191; *Crapo v. Seybold*, 35 Mich. 169; 36 Mich. 444; *Bank v. Hibbard*, 48 Mich. 118; *Newhall v. Langdon*, 39 Ohio St. 87. But see, *contra*, *Woods v. McGee*, 7 Ohio, 467; *Pollock v. Fisher*, 1 Allen (N. B.) 515; *Waldo v. Belcher*, 11 Ired. 609; *Gardiner v. Suydam*, 7 N. Y. 357.

<sup>3</sup> *Lamprey v. Sargent*, 58 N. H. 241; *Page v. Carpenter*, 10 N. H. 77; *Weld v. Cutler*, 2 Gray, 195; *Brewer v. Salisbury*, 9 Barb. 511; *Crofoot v. Bennett*, 2 N. Y. 258.

<sup>4</sup> *Waldron v. Chase*, 37 Me. 414. See *Nesbit v. Burry*, 25 Pa. St. 208. <sup>†</sup> *Whitehouse v. Frost*, 12 East, 614.

<sup>6</sup> *Box v. Provincial Ins. Co.*, 18 Grant, 280; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466. In these cases the court held that the buyer had an insurable interest.



where the vendor agrees to hold the goods subject to the buyer's order.<sup>1</sup>

§ 89. **What constitutes a sufficient appropriation in sales of goods not specific.** — Where the contract is for the sale of goods not specifically described, the title, as already explained in the preceding paragraph, does not pass until there has been a sufficient appropriation of the specific goods to the contract. In the first place, the goods must be selected and set apart for delivery to the purchaser. But this is not enough. The appropriation must be made with the express or implied consent of the purchaser. As long as the buyer does not in some form accept the goods, or otherwise assent to the appropriation of them to the performance of the contract, the title does not pass, and the vendor may make some other disposition of the goods so appropriated, without in any way invading any vested right of the buyer.<sup>2</sup> And this is true, although the goods have been expressly manufactured for the buyer. Before title can pass, they must be completed and be delivered, or there must be a tender of delivery.<sup>3</sup>

<sup>1</sup> *Damon v. Osborn*, 1 Pick. 476; *Kimberly v. Patchin*, 19 N. Y. 330; *Watts v. Hendry*, 13 Fla. 523; *Chapman v. Shepard*, 39 Conn. 413. But see, *contra*, *Field v. Moore*, Hill & Denio, 418; *Scudder v. Worster*, 11 Cush. 573; *Box v. Provincial Ins. Co.*, 15 Grant Ch. 337; *Foat v. Marsh*, 51 N. Y. 238.

<sup>2</sup> *Atkinson v. Bell*, 8 B. & C. 277; *Heyward's Case*, 2 Coke, 36; *National Bank v. Bangs*, 102 Mass. 291, 295; *Aldridge v. Johnson*, 7 E. & B. 885; 26 L. J. Q. B. 296; *Bryans v. Nix*, 4 M. & W. 775; *Campbell v. The Mersey Docks*, 14 C. B. (N. S.) 412; *Hanson v. Meyer*, 6 East, 614; *Rugg v. Minnett*, 11 East, 210; *Rohde v. Thwaites*, 6 B. & C. 688; *Moody v. Brown*, 34 Me. 107; *Rider v. Kelley*, 32 Vt. 268; *Stock v. Inglis*, 9 Q. B. Div. 708; *Elliott v. Pybus*, 10 Bing. 512; *Gowans v. Consolidated Bank of Canada*, 43 Up. Can. Q. B. 318; *De Wolf v. Gardner*, 12 Cush. 26; *Hatch v. Lincoln*, 12 Cush. 34; *Prince v. Boston, etc., R. R. Co.*, 101 Mass. 547; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Elliott v. Bradley*, 23 Vt. 217; *Grove v. Brien*, 8 How. 429; *Gibson v. Stevens*, 8 How. 34.

<sup>3</sup> *Bement v. Smith*, 15 Wend. 493; *Higgins v. Murray*, 4 Hun, 565; *Shawhan v. Van Nast*, 25 Ohio St. 490; *Specers v. Harvey*, 9 R. I. 582;

But, as already stated, this assent need not be express. It may be implied from various acts of the parties and the terms of the contract. Merely putting a tag on the goods, with the name of the purchaser, would not suffice, unless shown to be done with the consent of the purchaser.<sup>1</sup> But notice to the purchaser of the appropriation and his promise to take the goods away, will, of course, pass the title.<sup>2</sup> So will, also, filling the purchaser's sacks with the selected goods. So, also, when the agreement of the parties, or usage and custom, authorizes the vendor to do so, a delivery of the selected goods to a common carrier will be a sufficient assent to the appropriation, in order to pass the title.<sup>4</sup> The title also passes on delivery of the bill of lad-

*Ballentine v. Robinson*, 46 Pa. St. 477; *Gordan v. Norris*, 49 N. H. 376, *Mt. Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Goddard v. Binney*, 115 Mass. 456; *Atkinson v. Bell*, 8 B. & C. 277; *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshay*, 3 B. & C. 415.

<sup>1</sup> *Jenner v. L.* R. 4 C. P. 270.

<sup>2</sup> *Rohde v. Thwaites*, 6 B. & C. 388.

<sup>3</sup> *Aldridge v. Johnson*, 7 E. & B. 385; 26 L. J. B. 296; *Langton v. Higgs*, 4 H. & N. 402; 23 L. J. Ex. 252.

<sup>4</sup> *Fragano v. Long*, 4 B. & C. 219; *Dutton v. Solomonson*, 3 B. & P. 582; *Cork Distilleries Co. v. Great Southern, etc., Ry. Co.*, L. R. 7 H. L. 269; *Johnson v. Lancashire, &c., Ry. Co.*, 3 C. P. D. 499; *Krulder v. Ellison*, 47 N. Y. 86; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Wilkins v. Bromhead*, 6 M. & G. 963; s. c. 7 Scott N. R. 921; *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Brown v. Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; *Ex. Ch.* 4 H. & N. 322; 29 L. J. Ex. 6; *Ex parte Pearson*, 3 Ch. 443; *The Mary & Susan*, 1 Wheat. 25; *Magruder v. Gage*, 33 Md. 344; *Gutwillig v. Zuberblier*, 2 N. Y. St. Rep. 605; *Balley v. Hudson River R. R. Co.*, 49 N. Y. 70; *Whiting v. Farrand*, 1 Conn. 60; *Blum v. The Caddo*, 1 Woods, 64; *Schmertz v. Dwyer*, 53 Pa. St. 335; *Putnam v. Tillotson*, 13 Met. 517; *Waldron v. Romanie*, 22 N. Y. 368; *Hunter v. Wright*, 12 Allen, 548; *Claffin v. Boston, etc., R. R. Co.*, 7 Allen, 341; *Torry v. Corliss*, 33 Me. 333, 336; *Ober v. Smith*, 78 N. C. 313; *Summerl v. Elder*, 1 Binn. 106; *Stanton v. Eagan*, 16 Pick. 467; *Stafford v. Walter*, 67 Ill. 83; *Ranney v. Higby*, 4 Wis. 154; 5 Wis. 62; *Wing v. Clark*, 24 Mo. 366; *Griffith v. Ingledew*, 6 S. & R. 429; *Grove v. Brien*, 8 How. 438; *Lawrence v. Minturn*, 17 How. 107; *Johnson v. Stoddard*, 100 Mass. 306; *Odell v. Boston, &c., R. R. Co.*, 109 Mass. 50; *Armentrout v. St. Louis R. R. Co.*, 1 Mo. App. 158; *Phila., &c., R. R. Co. v. Wiseman*, 88 Pa. St. 265.

ing.<sup>1</sup> Whether the title will pass to a part of the goods, before the rest has been delivered to the carrier, has been decided both in the affirmative,<sup>2</sup> and in the negative.<sup>3</sup> These cases are different from those in which only part of the goods is delivered with no intention of sending the rest. In the latter cases, the title does not pass.<sup>4</sup>

But it is always a question of intention whether or not the title to the goods passes on delivery and before actual receipt by the consignee.<sup>5</sup> The presumption of law is in favor of the title passing, while the intention to the contrary is usually manifested by some act of the parties or term of the contract. Thus it has been held that the title does not pass with delivery, where the vendor is to pay the freight,<sup>6</sup> where the vendee is to prepay the price;<sup>7</sup> where the bill of lading runs in the name of the shipper, and is unindorsed and not delivered to the consignee;<sup>8</sup> and where the goods delivered were not ordered at all<sup>9</sup> or are materially different from those which were ordered, either in quality or

<sup>1</sup> *Brown v. Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; 29 L. J. Ex. 6; *Tegallas v. Sewell*, 7 H. & N. 571.

<sup>2</sup> *Calcutta Company v. De Mattos*, 32 L. J. Q. B. 322. In this case, the court held the title to pass on delivery to the carrier, although the parties agreed that half the price was not to be due, until the goods had been delivered to the consignee at the port of destination.

<sup>3</sup> *Bryans v. Nix*, 4 M. & W. 775.

<sup>4</sup> *Bruce v. Pearson*, 3 Johns. 584; *Rochester Oil Co. v. Hughley*, 56 Pa. St. 322.

<sup>5</sup> *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Prince v. Boston, &c., R. R. Co.*, 101 Mass. 547; *Wigton v. Bowley*, 180 Mass. 252; *Strauss v. Wessell*, 30 Ohio St. 211.

<sup>6</sup> *Suit v. Woodhall*, 113 Mass. 391; *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

<sup>7</sup> *Godis v. Rose*, 17 C. B. 229; 25 L. J. C. P. 61.

<sup>8</sup> *Wise v. McMahon*, Longf. & T. 192.

<sup>9</sup> *The Francis*, 2 Gall. 391; *St. Joze Indians*, 1 Wheat. 208. *The Julia*, 8 Cranch, 188. Whether a consignment to a factor for sale, or to a creditor in liquidation of the debt, passes title on delivery to the carrier, see, *Elliott v. Bradley*, 23 Vt. 217; *Saunders v. Bartlett*, 12 Heisk. 316; *Oliver v. Moore*, 12 Heisk. 482; *Bonner v. Marsh*, 10 Smed. & M. 376; *Hodges v. Kimball*, 49 Iowa, 577.

character<sup>1</sup> or in quantity, being more or less than what was ordered. In such cases, the consignee may reject the entire shipment. He cannot be compelled to receive the part which he had ordered, nor can he be sued for the price unless he had accepted the goods, thus wrongfully shipped.<sup>2</sup> So, also, the title does not pass on delivery to the carrier, when there is no express or implied authority from the buyers to make such a delivery.<sup>3</sup> The title will not pass on delivery to the common carrier, if the directions to the consignee on the packages are not distinct and correct. This is a natural and reasonable ruling.<sup>4</sup>

But when there has been an appropriation, which is not binding for any reason, such as variance in the quantity or quality of the goods, and the like, a second appropriation may be made, which will bind the purchaser, provided the delay in shipment, caused by the error in the first appropriation, does not constitute the breach of a material condition of the contract.<sup>5</sup>

<sup>1</sup> *Gardner v. Lane*, 9 Allen, 492; 11 Allen, 89; 98 Mass. 517.

<sup>2</sup> *Cunliff v. Harrison*, 6 Ex. 903; *Hart v. Mills*, 15 M. & W. 85; *Dixon v. Fletcher*, 8 M. & W. 145; *Rommel v. Wingate*, 108 Mass. 327; *Larkin v. Mitchell Lumber Co.*, 42 Mich. 296; *Barton v. Kane*, 17 Wis. 38; *Downer v. Thompson*, 6 Hill, 208; *Defenbaugh v. Weaver*, 87 Ill. 132; *Downs v. Marsh*, 29 Conn. 409; *Bruce v. Pearson*, 3 Johns. 534; *Rochester Oil Co. v. Hughley* 56 Pa. St. 322; *Corning v. Colt*, 5 Wend. 254. In *Levy v. Green*, 1 E. & E. 969; 28 L. J. Q. B. 319, all the goods which were ordered were sent, but in addition other goods of a different character were packed in the same crate. The title to the goods ordered was held not to pass. See, also, *Tarling v. O'Riordan* 2 L. R. Ir. 82, C. A.; 27 L. J. Q. B. 111.

<sup>3</sup> *Loyd v. Wright*, 20 Ga. 574; *Hanover v. Bartels*, 2 Col. 514; *Hague v. Porter*, 3 Hill, 141.

<sup>4</sup> *Woodruff v. Noyes*, 15 Conn. 335; *Finn v. Clark*, 10 Allen, 479; 12 Allen, 522; *Garrelson v. Selby*, 37 Iowa, 529.

<sup>5</sup> *Borrowman v. Free*, 4 Q. B. D. 500, C. A. See *Gath v. Lees*, 3 H. & C. 558.

## CHAPTER VIII.

### DELIVERY.

- SECTION 92.** What is meant by delivery.  
93. When buyer entitled to delivery.  
94. When and how far it is vendor's duty to make delivery.  
95. Delivery to the common carrier.  
95a. Delivery to a warehouseman.  
96. Place of delivery.  
97. Buyer's license to enter premises, irrevocable.  
98. Time of delivery.  
99. Computation of time — Divisions of time — Hour of the day.  
100. Reasonable time — Forthwith — As soon as possible.  
101. Quantity to be delivered — Effect of partial delivery.  
102. Effect of words of indefinite estimate — More or less —  
About — Say about.  
103. Delivery by installments.  
104. Form of delivery — Actual and constructive delivery.  
105. Symbolical delivery.  
106. What delivery is sufficient as against creditors and subsequent purchasers.  
107. Second delivery permissible, when first is defective.  
108. Rescission of sale — Rights of vendee's creditors.  
109. Delivery incomplete without acceptance.

§ 92. What is meant by delivery.— As has been already explained in a preceding chapter,<sup>1</sup> the term "delivery" has been employed in more than one sense, sometimes meaning a transfer of title, and at other times a transfer of possession. The only sense in which the word can properly be used is in that of transfer of possession. It is in this sense that the present writer employs the word. The subject of the present chapter is, therefore, the transfer of possession in the performance of the executory contract of sale.

<sup>1</sup> See *ante*, § 84.

§ 93. When buyer entitled to delivery — Delivery and payment concurrent acts.— It has been already sufficiently explained in the preceding chapter,<sup>1</sup> to enable us to dispense with further explanation, that there cannot be any transfer of title, and hence of possession, until there has been some specification or individualization of the goods sold. But the buyer is not always entitled to possession, although the goods are specific or have been selected and identified. If the sale is on credit, and nothing is said about the time of delivery, the buyer is entitled to immediate delivery, without payment of the price. The vendor cannot in such case claim the right to retain the possession, until the price has been paid,<sup>2</sup> and the title passes absolutely.<sup>3</sup> But if the possession has not yet been transferred, when the buyer becomes insolvent, it seems that the vendor may retain possession, and refuse to deliver it.<sup>4</sup>

But where there is no agreement for future payments, the sale becomes a cash transaction, in which the delivery of the goods and the payment of the price are concurrent and inter-conditional acts.<sup>5</sup> The buyer cannot demand a delivery of the goods without payment of the price or a tender of payment. Nor can the vendor require payment without tender of delivery.<sup>6</sup> And while a delivery without

<sup>1</sup> See *ante*, chap. vii.

<sup>2</sup> *Bloxam v. Sanders*, 4 Barn. & C. 941.

<sup>3</sup> *Machaners v. Long*, 85 Pa. St. 158; *Harris v. Smith*, 3 Serg. & R. 21; *Scott v. Wells*, 6 Watts & S. 357.

<sup>4</sup> *Bloxam v. Sanders*, 4 Barn. & C. 941; citing *Tooke v. Hollingsworth*, 5 T. R. 215.

<sup>5</sup> *Hashins v. Warren*, 115 Mass. 533; *Phelps v. Hubbard*, 51 Vt. 589.

<sup>6</sup> *Toledo, &c., Ry. Co. v. Gilvin*, 81 Ill. 511; *Chapin v. Potter*, 1 Hilt. 366, 376; *Whitcomb v. Hungerford*, 42 Barb. 177; *Conway v. Bush*, 4 Barb. 564; *Hancock v. Gibson*, 3 Up. Can. Q. B. 41; *Haskins v. Warren*, 115 Mass. 533; *Pierson v. Hoag*, 47 Barb. 244; *Fleeman v. McKean*, 25 Barb. 474; *McDonald v. Hewlett*, 15 Johns. 349; *Mich. Cent. E. R. Co. v. Phillips*, 60 Ill. 190; *Knight v. New Eng. Worsted Co.*, 2 Cush. 271; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Goodwin v. Boston, &c., R. R. Co.*, 111 Mass. 487; *Freeman v. Nichols*, 116 Mass. 309; *Barnes v. Bart-*

exaction of payment usually operates as a waiver of prepayment, and causes the absolute title to the goods to vest in the purchaser,<sup>1</sup> if the vendor makes delivery in expectation of an immediate payment of the price, the transfer of title and possession is in such a case only conditional; and the vendor may reclaim the goods and re-vest the title to them in himself.<sup>2</sup>

§ 94. **When and how far it is vendor's duty to make delivery.** — If the parties have not entered into any express agreement in relation to it, the vendor is not required to send or carry the goods to the vendee. He performs his full duty when he stands ready to deliver the goods to the vendee, at his call. And if the vendee does not call for the goods, the vendor may nevertheless sue for the price in an action for goods bargained and sold, although the goods remain in his possession.<sup>3</sup>

lett, 15 Pick. 77; *Scudder v. Bradbury*, 106 Mass. 422; *West. Transp. Co. v. Marshall*, 4 Abb. N. Y. App. 575; *Tipton v. Feltner*, 20 N. Y. 423; *Leonard v. Davis*, 1 Black. 476; *Platt v. McFaul*, 4 Up. Can. C. P. 233; *Moore v. Logan*, 5 Up. Can. C. P. 294; *Butters v. Stanley*, 21 Up. Can. C. P. 402; *Wright v. Weed*, 6 Up. Can. Q. B. 140; *Hefferman v. Berry*, 32 Up. Can. Q. B. 518; *McCann v. Kirlin*, 3 Allen N. B. 345; *Phippen v. Stickney*, 19 Up. Can. C. P. 416; *Machaners v. Long*, 85 Pa. St. 158; *Southw. Freight Co. v. Plant*, 45 Mo. 517.

<sup>1</sup> *Smith v. Lynes*, 1 Seld. 41; *Haskins v. Warren*, 115 Mass. 533; *Farlow v. Ellis*, 15 Gray, 229.

<sup>2</sup> *Paul v. Read*, 52 N. H. 136; *Beauchamp v. Archer*, 58 Cal. 431 (41 Am. Rep. 266); *Deshon v. Bigelow*, 8 Gray, 159; *Ferguson v. Clifford*, 37 N. H. 86; *Palmer v. Hand*, 13 Johns. 434 (7 Am. Dec. 392); *Conway v. Bush*, 4 Barb. 564; *Gardner v. Clark*, 21 N. Y. 399; *Hodgson v. Barrett*, 33 Ohio St. 68 (31 Am. Rep. 527); *Harris v. Smith*, 3 Serg. & R. 20; *Henderson v. Lanch*, 21 Pa. St. 359; *Adair v. Malone*, 1 Hud. & B. 49; *Riley v. Wheeler*, 42 Vt. 528; *Leedom v. Phillips*, 1 Yeates, 527; *Hill v. McKenzie*, 3 Thomp. & C. 122; *Miller v. Jones*, 66 Barb. 148; *Leven v. Smith*, 1 Denio, 571; *Luey v. Bundy*, 9 N. H. 302; *Marston v. Baldwin*, 17 Mass. 606; *Owens v. Weedman*, 82 Ill. 409.

<sup>3</sup> *Wade v. Moffitt*, 21 Ill. 110 (74 Am. Dec. 79); *Kohl v. Lindley*, 39 Ill. 195; *Bissell v. Balcom*, 39 N. Y. 275; *Morse v. Sherman*, 106 Mass. 430, 432; *Frazier v. Simmons*, 139 Mass. 531, 535; *Turner v. Langdon*,

But when it is the duty of the vendor to forward the goods to the vendee, he can maintain no action until he has performed this additional duty.<sup>1</sup> But, even then, he may be excused, if the buyer was required to designate the place of delivery and receipt,<sup>2</sup> or to furnish the means of transportation,<sup>3</sup> and he failed to do so. If the vendor positively agrees to deliver the goods at the residence or place of business of the buyer, he incurs loss arising from damage suffered by the goods in the course of transportation.<sup>4</sup> But where there is no positive agreement to that effect, a

§ 95. **Delivery to the common carrier,** — for transportation to the vendee, whether in accordance with his express or implied instructions, is held to be a delivery to the vendee's agent, and equivalent to a delivery to the vendee himself.<sup>5</sup> And delivery at the carrier's wharf or ware-

112 Mass. 265; *Allingham v. O'Mahoney*, 1 Pugs. 326; *Stearns v. Washburn*, 7 Gray, 187.

<sup>1</sup> *Council Bluffs Iron Co. v. Cuppey*, 41 Iowa, 104; *Cocker v. Franklin Hemp Co.*, 3 Sumn. 530; *Cornwith v. Colter*, 82 Ill. 585; *Steele Works v. Dewey*, 37 Ohio St. 242; *Smith v. Wheeler*, 7 Ore. 49.

<sup>2</sup> *Hunter v. Wetsell*, 84 N. Y. 549; *Higgins v. Murray*, 73 N. Y. 252; *Weld v. Came*, 98 Mass. 152.

<sup>3</sup> *Bolton v. Riddle*, 35 Mich. 18; *Kunkle v. Mitchell*, 56 Pa. St. 100; *Armitage v. Insole*, 14 Q. B. 728; *Davies v. McLean*, 21 W. R. 264; 28 L. T. (N. S.) 113; *Staunton v. Austin*, L. R. 7 C. P. 651; *Sutherland v. Allhusen*, 14 L. T. (N. S.) 666.

<sup>4</sup> *Taylor v. Cole*, 111 Mass. 363.

<sup>5</sup> *Bradford v. Marbury*, 12 Ala. 520 (46 Am. Dec. 264); *Hobart v. Littlefield*, 13 R. I. 341; *Ludlow v. Bowne*, 1 Johns. 115; *Dunlop v. Lambert*, 6 Clark & F. 600; *Hunter v. Wright*, 12 Allen, 548; *Garland v. Lane*, 46 N. H. 245; *Thompson v. Baltimore, &c., R. R. Co.*, 28 Md. 396; *Burton v. Baird*, 44 Ark. 556; *State v. Carl*, 43 Ark. 353; *Pilgreen v. State*, 71 Ala. 368; *State v. O'Neill*, 58 Vt. 140 (56 Am. Rep. 557); *Sarbecker v. State*, 65 Wis. 171 (56 Am. Rep. 624); *Fragano v. Long*, 4 Barn. & C. 219; *Dawes v. Peck*, 8 T. R. 330; *Johnson v. Dodgson*, 2 M. & W. 653; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401; *Hart v. Bush*, E. B. & E. 494; 27 L. J. Q. B. 271; *Smith v. Hudson*, 6 B. & S. 431; 84 L. J. Q. B. 145; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Norman v. Phillips*, 4 M. & W. 277; *Com. v. Farnum*, 114 Mass. 267; *Jannay v.*



house, to some receiving clerk, would ordinarily be a sufficient delivery to the carrier, in order to pass title and risk to the vendee.<sup>1</sup> But this is not the case, where the seller determines, or the contract requires him, to make the common carrier his own agent. In such cases, there is no transfer of possession, until the goods have been delivered by the carrier to the vendee or his agent.<sup>2</sup> The common method of reserving title and possession after delivery to the carrier is to have the bill of lading written up in the shipper's name, and the goods deliverable to the shipper's order. Whenever that is done, the common carrier is an agent of the seller, and there is no delivery of possession, until the bill of lading has been indorsed and transferred.<sup>3</sup>

But in making delivery to a common carrier, in order to throw the risk on the buyer, the vendor must take every precaution to insure a safe delivery to the buyer. Any mistake in the address, or in the notice to the carrier of the character of the goods, and the like, whereby loss of or

*Sleeper*, 80 Minn. 473; *Garbracht v. Com.*, 96 Pa. St. 449 (42 Am. Rep. 550); *Finch v. Mansfield*, 97 Mass. 89; *Abberger v. Marin*, 102 Mass. 70; *Brockway v. Maloney*, 102 Mass. 308; *Dolan v. Green*, 110 Mass. 323; *Frank v. Hoey*, 128 Mass. 263; *Tegler v. Shipman*, 33 Iowa, 194 (11 Am. Rep. 118); *Shuenfeldt v. Junkerman*, 20 Fed. Rep. 357; *Hill v. Spear*, 50 N. H. 253 (9 Am. Rep. 205); *Boothby v. Plaisted*, 51 N. H. 436 (13 Am. Rep. 140); *Ranney v. Higby*, 4 Wis. 154; *Somers v. McLaughlin*, 57 Wis. 364.

<sup>1</sup> *Hobart v. Littlefield*, 13 R. I. 341; *Packard v. Getman*, 6 Cow. 757; *R. R. Co. v. Barrett*, 36 Ohio St. 448.

<sup>2</sup> *Dunlop v. Lambert*, 6 Clark & F. 600; *Walt v. Baker*, 2 Ex. 1; *Perkins v. Eckert*, 55 Cal. 400; *Hall v. Gaylor*, 37 Conn. 550; *Magruder v. Gage*, 33 Md. 344 (3 Am. Rep. 177); *Ranney v. Higby*, 5 Wis. 62; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

<sup>3</sup> *Forchelmer v. Stewart*, 65 Iowa, 594 (54 Am. Rep. 30). See, *First Nat. Bank v. Crocker*, 111 Mass. 163, 167; *Reynolds v. Scott*, 4 Pac. Rep. 346; *Ellershaw v. Magniac*, 6 Ex. 570; *Jenkyns v. Brown*, 14 Q. B. 496; 19 L. J. Q. B. 286; *Gabarron v. Kreeft*, L. R. 10 Ex. 474; *Ex parte Banner*, L. R. 2 Ch. D. 78; *Mason v. Great West. Ry. Co.*, 81 Up. Can. Q. B. 73; *Ogg v. Shuter*, L. R. 1 C. P. D. 47; *Shepherd v. Harrison*, L. R. 4 Q. B. 196; *Waite v. Baker*, 2 Ex. 1; *Wilmshurst v. Bowker*, 2 Man. & G. 792 (7 Man. & G. 882).

damage to the goods results, will make the vendor responsible.<sup>1</sup> And any deviation from the express instructions of the buyer, or any change by the seller in the directions for transportation after the goods have been given to the carrier, would operate to retain the possession and title in the vendor, and prevent the transfer of them to the vendee.<sup>2</sup>

§ 95a. **Delivery to a warehouseman.** — There is also, a sufficient delivery in order to transfer the title and risk to the buyer, if the goods are delivered to a warehouseman, to be kept by him for the buyer, the delivery being made in accordance with the terms of the contract or the instructions of the buyer.<sup>3</sup>

§ 96. **Place of delivery.** — If the parties have not selected or designated a place for delivery of the goods in the performance of a contract of sale, the goods must be held ready for delivery at the place where they were at the time of sale.<sup>4</sup> And the vendor assumes all the risk of an attempt to make delivery anywhere else.<sup>5</sup> So, likewise, will he be liable to the vendee for any greater expense which might

<sup>1</sup> *Clarke v. Hutchins*, 14 East, 475. In this case, carrier disclaimed responsibility for loss of package over 5*l.* in value, unless notified of the value. The seller failed to give this notice. See, also, *Bull v. Robinson*, 10 Ex. 341; *Johnson v. Stoddard*, 100 Mass. 300; *Whiting v. Farrand*, 1 Conn. 60; *Downer v. Thompson*, 2 Hill, 137; *Quimby v. Carr*, 7 Allen, 417; *Finn v. Clark*, 10 Allen, 484; *s. c.*, 12 Allen, 522; *Foster v. Rockwell*, 104 Mass. 170; *Odell v. Boston, &c., R. R. Co.*, 109 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252.

<sup>2</sup> *Wheelouser v. Parr*, Mass. (1886) 6 N. E. Rep. 787.

<sup>3</sup> See *Hunter v. Wright*, 12 Allen, 548; *Williams v. Lerch*, 56 Cal. 330; *Means v. Williamson*, 37 Me. 556.

<sup>4</sup> *Rice v. Churchill*, 2 Denio, 145; *Middlesex Co. v. Osgood*, 4 Gray, 429; *Barr v. Nyers*, 3 Watts & S. 299; *Goodwin v. Holbrook*, 4 Wend. 380; *Kraft v. Hertz*, 11 Mo. 109; *Lobdell v. Hopkins*, 5 Cow. 516; *Miles v. Roberts*, 34 N. H. 253; *Smith v. Gillette*, 50 Ill. 290; *Jacoby v. Schwartzwelder*, 1 Bibb. 430; *Lucas v. Nicholls*, 5 Gray, 309; *Field v. Bunk*, 2 N. J. 525; *Brownson v. Gleason*, 7 Barb. 472.

<sup>5</sup> 2 Schouler Personal Prop., § 385.

be incurred in getting the goods to the intended place of destination, arising out of the vendor's delivery at the wrong place.<sup>1</sup> But if a place is designated, or to be designated by the parties or by one of them, then delivery must be made at that place, and cannot be made elsewhere, without the consent of all parties.<sup>2</sup> And if the buyer is to designate the place of delivery, his failure to do so within a reasonable time is a good excuse for non-delivery, and enables the vendor to sue for the price without making delivery.<sup>3</sup> So, also, if the vendor is to select the place of delivery, he must give the vendee reasonable notice in advance of his selection, in order that the delivery at that place may operate as a transfer of possession to the vendee.<sup>4</sup>

If the goods are already in the possession of the buyer, no other place of delivery will be presumed; indeed, there is no need of any formal delivery whatever.<sup>5</sup>

<sup>1</sup> Story on Sales, § 308.

<sup>2</sup> *Lucas v. Nichols*, 5 Gray, 309; *Mellidge v. Boston Iron Co.*, 5 Cush. 158 (51 Am. Dec. 59); *Devine v. Edwards*, 101 Ill. 138. But the parties may waive delivery at the designated place, and provide for it elsewhere. And the waiver may be by parol agreement. *Hunt v. Thurman*, 15 Vt. 386 (40 Am. Dec. 683); *McCombs v. McKennan*, 2 Watts & S. 216.

<sup>3</sup> *Lucas v. Nichols*, 5 Gray, 309; *Smith v. Wheeler*, 7 Oreg. 49; *Boyd v. Gunnison*, 14 W. Va. 1; *Hunter v. Wetsell*, 84 N. Y. 549; (38 Am. Rep. 544); *Brunshill v. Muir*, 15 Up. Can. Q. B. 213; *Bolton v. Riddle*, 35 Mich. 13; *Higgins v. Murray*, 73 N. Y. 252; *Weid v. Came*, 98 Mass. 152. So, also, where the goods are to be delivered on board of the purchaser's vessel, the purchaser must give notice to the seller when he is ready to receive them. *Armitage v. Insole*, 14 Q. B. 728; *Davies v. McLean*, 21 W. R. 264; 28 L. T. (N. S.) 113; *Stanton v. Austin*, L. R. 7 C. P. 651; *Sutherland v. Allhuser*, 14 L. T. (N. S.) 666.

<sup>4</sup> *Rogers v. Van Hoesen*, 12 Johns. 221; *Davies v. McLean*, 21 W. R. 264; 28 L. T. (N. S.) 113.

<sup>5</sup> *Shurtleff v. Willard*, 19 Pick. 210; *Lake v. Morris*, 30 Conn. 201; *Warden v. Marshall*, 99 Mass. 305; *Macomber v. Parker*, 13 Pick. 175; *Nichols v. Patten*, 18 Me. 231. The same rule applies to sales of undivided interest in property by one tenant in common to another. *Beaumont v. Crane*, 14 Mass. 400; *Kittredge v. Sumner*, 11 Pick. 50; *Cushing v. Breed*, 14 Allen, 376.

§ 97. **Buyers license to enter premises irrevocable.** — If the buyer has, by the terms of the contract, to remove the goods from the place of deposit, he has an implied license to go upon the land, or into the building where they are deposited, for the purpose of removing them; and this license is irrevocable.<sup>1</sup>

§ 98. **Time of delivery.**—The time of performance does not always go to the essence of the contract, and where it does not, any reasonable delay in the performance of the contract will not authorize the vendee to refuse acceptance of the goods, when tendered, unless some injury is sustained by the vendee in consequence of the delay.<sup>2</sup> But where injury results from the delay in the time of performance, or the parties have expressly agreed upon a time of performance, in such a manner as to make its observance a condition precedent to the obligation of the vendee for the price,—the time of performance going to the essence of the contract—the vendee is not obliged to receive the goods unless they are delivered within the time agreed upon.<sup>3</sup> And if any damage is suffered by the vendee in consequence of this delay, the vendee, in addition to refusing the goods, will be able to recover of the vendor the damages thus suffered.<sup>4</sup> Where the buyer is to desig-

<sup>1</sup> *McLeod v. Jones*, 105 Mass. 408; *McNeal v. Emerson*, 15 Gray, 384; *Wood v. Tassell*, 6 Q. B. 284; *Salter v. Woollams*, 2 Man. & G. 650; *Bentall v. Barr*, 3 Barn. & C. 423; *Wood v. Manley*, 11 Ad. & E. 84.

<sup>2</sup> *Paton v. Rogers*, 1 Ves. & Beam. 351; *Thomas v. Dering*, 1 Keen, 729; *Voorhees v. De Meyer*, 2 Barb. 37. But where the delay became unreasonable, although no injury resulted, the vendee may rescind the sale, by giving notice to the vendor. *Benson v. Lamb*, 9 Beav. 502.

<sup>3</sup> *Ellis v. Thompson*, 8 M. & W. 445; *Jones v. Gibbons*, 8 Ex. 920; *Samson v. Rhodes*, 8 Scott, 544; *Suydam v. Clarke*, 2 Sandf. 133; *Hipwill v. Knight*, 1 Younge & Call. 415; *Coslake v. Till*, 1 Russ. 376; *Winshurst v. Deeley*, 2 C. B. 253; *Higgins v. Delaware R. R. Co.*, 60 N. Y. 557.

<sup>4</sup> *Rhodes v. Cleveland Rolling Mills*, 17 Fed. Rep. 426; *New Haven, &c., R. R. Co. v. Quintard*, 31 N. Y. S. C. 89; *Phillips v. Taylor*, 49 N. Y. S. C. 318.

nate the time of performance, as where he has an option to buy within certain periods of time,<sup>1</sup> or where the delivery is to be made on demand of the buyer,<sup>2</sup> the buyer must give notice to the seller, before there can be any action against the seller for breach of the contract.

The performance of the contract within the agreed time may be waived by subsequent agreement or tacit understanding of the parties. But in order that a waiver as to time may be established, either acts must be shown which amount to an estoppel, or an express agreement founded upon a new consideration must be proven.<sup>3</sup>

**§ 99. Computation of time—Divisions of time—Hour of the day.**—In the computation of time in commercial contracts, the word “month” means calendar month, and not lunar month.<sup>4</sup>

Where the computation is by days, consecutive days, including Sundays, are meant.<sup>5</sup>

Ordinarily, in the computation of time, the first day is

<sup>1</sup> *Colvin v. Weedman*, 50 Ill. 311; *Holt v. Brown*, 63 Iowa, 319 (“on or before” a certain date.)

<sup>2</sup> *Bowdell v. Parsons*, 10 East, 359; *Squier v. Hunt*, 3 Price, 68; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Amory v. Broderick*, 5 Barn. & Ald. 712.

<sup>3</sup> *Phillips v. Taylor*, 49 N. Y. S. C. 318; *Hill v. Blake*, 48 N. Y. S. C. 283; *Brown v. Bowen*, 30 N. Y. 541; *Underwood v. Farmers', &c., Ins. Co.*, 57 N. Y. 306. See *Davis v. Budd*, 60 Iowa, 144; *Hill v. Blake*, 97 N. Y. 216.

<sup>4</sup> *Churchill v. Merchants' Bank*, 19 Pick. 532; *Reg. v. Chawton*, 1 Q. B. 247; *Webb v. Fairmanner*, 3 M. & W. 473; *Hart v. Middleton*, 2 C. & K. 9. See, also, *Long v. Gale*, 1 Maule & S. 111; *Matter of Swonford*, 6 Maule & S. 226; *McMurchev v. Robinson*, 10 Ohio, 496; *Thomas v. Shoemaker*, 6 Watts & S. 179. At common law, lunar months were presumed to have been intended, unless the contrary intention was shown. 2 *Bouvier's Law Dict.* 195; *Rives v. Guthrie*, 1 Jones (N. C.) 87; *Benjamin Sales*, § 684.

<sup>5</sup> *Brown v. Johnson*, 19 M. & W. 331; *Cochran v. Retberg*, 3 Esp. 131. See, also, *Helplenstrue v. Vincennes Nat. Bank*, 65 Ind. 539; *People v. Hatch*, 33 Ill. 137; *Pulling v. People*, 8 Barb. 385; *Haines v. State*, 7 Tex. App. 33; *Woolley v. Clements*, 11 Ala. 229.

excluded, and the last day included, so that delivery will be good, if made at any reasonable hour on the last day named.<sup>1</sup> But where the limit of time for performance is stated to be "until" or "up to," a certain date, or "between" certain dates, the last day is excluded, as well as the first.<sup>2</sup> Where the word of limitation is "to" a certain date, it is doubtful whether the last day is included or excluded, the result varying with the facts of each case.<sup>3</sup> So, also, is "on" doubtful.<sup>4</sup> "On or before" a certain day gives the vendor the whole of the day named in which to make delivery.<sup>5</sup>

If the last day in the computation of the time of performance is a Sunday or other legal holiday, the delivery must be made on the next succeeding day. This is certainly true where the day of delivery is described as occurring a certain time after a given date.<sup>6</sup> But whether this rule would apply where the time of performance is described as "between" two dates, both dates being excluded, so that, if the day preceding the last date is a legal holiday, the last date will be included among the days of performance, does not appear to be settled by any of the authorities.

<sup>1</sup> *Webb v. Fairmanor*, 8 M. & W. 478.

<sup>2</sup> See *Cleveland v. Sterritt*, 70 Pa. St. 204; *Coniwingo Petroleum Co. v. Cunningham*, 75 Pa. St. 138; *People v. Walker*, 17 N. Y. 502; *Houghwort v. Bolsaubin*, 18 N. J. Eq. 815; *Farwell v. Rogers*, 4 Cush. 460; *Pease v. Norton*, 6 Greenl. 229; *Atkins v. Boylston, &c., Ins. Co.*, 5 Met. 440; *Newby v. Rogers*, 40 Ind. 9.

<sup>3</sup> See *Coniwingo Co. v. Cunningham*, 75 Pa. St. 138.

<sup>4</sup> *Coddington v. Paleologo*, L. R. 2 Ex. 198. In that case, the contract provided for "delivering on April 17th, complete 8th of May;" the court divided on the question whether the seller had to begin delivery on the 17th of April. See, also, *Beigham v. Blaenavon Iron Co.*, L. R. 10 Q. B. 819.

<sup>5</sup> *Adams v. Dale*, 29 Ind. 273.

<sup>6</sup> See *Avery v. Stewart*, 2 Conn. 69; *Sands v. Lyon*, 18 Conn. 18; *Staples v. Franklin Bank*, 1 Met. 43; *Kuntz v. Tompel*, 48 Mo. 75; *Colms v. Bank*, 4 Baxt. 422; *Salter v. Burt*, 20 Wend. 205; *Barrett v. Allen*, 10 Ohio, 426.

It depends upon the circumstances of each case, at what hour of the appointed day must the delivery be made, in order to be reasonable.

It has been held that the delivery may be made at any hour before midnight, provided sufficient time be given before midnight, in which to make an examination of the goods.<sup>1</sup> But the ordinary customs of the business world would require that the delivery to merchants should be made during business hours, unless the buyer is actually found after business hours at his place of business; and in any event, the delivery should be made before the time of retiring; and where the goods cannot be examined and assorted, except by daylight, the delivery should be made before sunset.<sup>2</sup>

§ 100. **Reasonable time — Forthwith — As soon as possible.** — When no time is fixed for delivery, the law presumes that the parties intend it to be made within a reasonable time. What is a reasonable time depends upon the facts of each case, varying with the circumstances to an unlimited extent.<sup>3</sup> And parol evidence is admissible to show what the parties thought about the time of performance.<sup>4</sup>

<sup>1</sup> *Startup v. McDonald*, 6 Man. & G. 598.

<sup>2</sup> *Crowinger v. Crocker*, 61 N. Y. 151; *McClartey v. Gokey*, 31 Iowa, 505; *Bass v. White*, 65 N. Y. 565; *Kirkpatrick v. Alexander*, 60 Ind. 95. See *Berry v. Noll*, 54 Ala. 446.

<sup>3</sup> See *Higgins v. Delaware, &c., R. R. Co.*, 558; *Kellam v. McKinstry*, 69 N. Y. 264; *Brighty v. Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38; *Bolton v. Riddle*, 35 Mich. 1; *Goodwin v. Crevely*, 4 Hurl. & N. 633; *Toms v. Wilson*, 4 B. & S. 442; 32 L. Q. B. 33, 382; *Graham v. Van Dieman's Land Co.*, 30 Eng. L. & Eq. 579; *Jackson v. Saunders*, 1 Schoales & L. 461; *Roberts v. Mazepa Mill Co.*, 30 Minn. 413; *Ellis v. Thompson*, 3 Mees. & W. 445; *Cocker v. Franklin, H. & F. Mfg. Co.*, 3 Sumn. 530. It is a question for the jury. *Roberts v. Mazepa Mill Co.*, *supra*; *Cochran v. Toker*, 14 Minn. 293; *Derosia v. Winona, &c., R. R. Co.*, 18 Minn. 119, 133; *Pinney v. First Div., &c., R. R. Co.*, 19 Minn. 211, 251.

<sup>4</sup> See *Cocker v. Franklin, H. & F. Mfg. Co.*, 3 M. & W. 445; *s. c.* 3

The vendor still has a reasonable time, in which to make delivery, where the contract provides for delivery "forthwith" "immediately," "directly," "as soon as possible."<sup>1</sup> But the employment of these expressions indicates an intention to hasten the delivery, and hence less delay is permissible in such cases, than where the law implies a reasonable time for performance, in the absence of all stipulations whatever.<sup>1</sup> But the attending facts may vary this conclusion somewhat, as where the delivery was to be "forthwith," but the stipulation for payment within fourteen days was held to show an intention that the goods should be delivered within the fourteen days.<sup>2</sup>

§ 101. **Quantity to be delivered — Effect of partial delivery.** — Where the contract calls for the delivery of a given quantity of unspecified goods, the contract cannot be performed, except by the delivery of the exact quantity which the buyer had bargained for. And the buyer may reject the goods entirely, if the vendor should deliver more of the goods than were ordered,<sup>3</sup> or should add to those

Sumn. 530; *Coates v. Sangston*, 5 Md. 121; *Ford v. Cotesworth*, L. R. 7 Q. B. 127. But it is not possible to show by parol evidence that the parties had agreed upon a time of delivery.

<sup>1</sup> "Directly," *Duncan v. Topham*, L. C. B. 225; "Forthwith," *Stanton v. Wood*, 16 Q. B. 638; *Roberts v. Brett*, 11 H. Cas. 387; 84 L. J. C. P. 241; "Immediately," *Rommell v. Wingate*, 103 Mass. 327; *Isaacs v. Plaster Works*, 67 N. Y. 124; *Neldon v. Smith*, 36 N. J. L. 148; "As soon as possible," *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. D. 670; 20 Eng. Rep. 102; *Poper v. Filley*, 3 McCrary, 190; *Rhodes v. Cleveland Rolling Mill Co.*, 17 Fed. Rep. 426. But it has been held that "as soon as possible" had reference to the number of orders ahead, and to the actual ability of the seller to make the delivery. See *Atwood v. Emery*, 1 C. B. (N. s.) 110.

<sup>2</sup> *Stainton v. Wood*, 16 Q. B. 638.

<sup>3</sup> *Dixon v. Fletcher*, 8 M. & W. 146; *Renter v. Sala*, 4 C. P. D. 239, C. A.; *Hart v. Mills*, 15 M. & W. 85; *Cunliffe v. Harrison*, 6 Ex. 903; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; *Rommell v. Wingate*, 103 Mass. 327; *Chandler v. De Graff*, 27 Minn. 208; *Iron Cliffs Co. v. Buhl*, 24 Mich. 86; *Croninger v. Crocker*, 62 N. Y. 151.



ordered others of a different kind.<sup>1</sup> In such cases the buyer is under no obligation to receive the whole package, and select and separate the goods which he had bought from those which had not been ordered. He could reject the entire package.<sup>2</sup>

Nor can the contract be performed by the delivery of a smaller quantity than what was ordered. If the vendor fails to deliver the right quantity within the time agreed upon the vendee may return what he has received, if any, and refuse to accept a part performance of the contract.<sup>3</sup> But if he accepts and retains the part which has been delivered, he must pay for that part,<sup>4</sup> although the buyer does not thereby become liable for the residue which is delivered after the lapse of a reasonable time. He may accept and pay for the part which had been delivered in due season, and reject the residue, which had not been seasonably delivered.<sup>5</sup> But until the time of delivery has completely

<sup>1</sup> *Levy v. Green*, 8 E. & B. 575; 27 L. J. Q. B. 111; in *Ex. C. H. 28 L. J. Q. B. 318*; *Tarling v. O'Riordan*, 2 Ir. L. R. 82, C. A.

<sup>2</sup> In *Cunliffe v. Harrison*, 6 Ex. 903, where the purchase was of ten hogshead of claret, and the vendor had sent fifteen, the performance of the contract was held defective, "for the person to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him," Parke, B. See also, to same effect, the cases cited in the preceding notes.

<sup>3</sup> *Oxendale v. Wetherell*, 9 B. & C. 386; *Bowes v. Shand*, 2 App. Cas. 455; *Senter v. Sala*, 4 C. P. D. 239, 244, C. A.; *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73; *Haines v. Tucker*, 50 N. H. 307; *Morgan v. Gath*, 3 Hurl. & C. 748; *Waddington v. Oliver*, 2 Bos. & P. N. R. 61; *Wright v. Barnes*, 14 Conn. 518; *Marland v. Stanwood*, 101 Mass. 470; *Smith v. Lewis*, 40 Ind. 98; *Rockford, &c., R. R. Co. v. Lent*, 63 Ill. 288.

<sup>4</sup> *Oxendale v. Wetherell*, 9 B. & C. 386; *Haines v. Tucker*, 50 N. H. 307; *Morgan v. Gath*, 3 H. & C. 748; 34 L. J. Ex. 165; *Avery v. Wilson*, 81 N. Y. 341 (37 Am. Rep. 503). But see apparently *contra* *McMillan v. Venderlip*, 12 Johns. 167; *Champlin v. Rowley*, 13 Wend. 260; *Mead v. DeGolyer*, 16 Wend. 636; *Kein v. Tupper*, 52 N. Y. 555; *Reed v. Randall*, 29 N. Y. 358 (86 Am. Dec. 305, 311).

<sup>5</sup> See *Wilson v. Wagar*, 26 Mich. 452.

elapsed, the buyer cannot be required to make his election to pay for the part delivered or to return it.<sup>1</sup>

§ 102. **Effect of words of indefinite estimate — More or less — About — Say about.** — Very often the contract calls for the sale of a given quantity “more or less,” or “about” or “say about” a given quantity; and the courts are called upon to determine the effect of these words of indefinite estimate. Where the contract is for the sale of specific goods, and the description identifies the goods to be sold, any reference to the quantity in these uncertain terms is to be taken as a matter of abundant description, requiring only good faith in the estimate, and does not operate as a warranty. Any divergence of the actual quantity from this indefinite estimate, which is consistent with good faith, will not make the performance of the contract defective.<sup>2</sup> But if the contract be a sale of unspecified goods, the estimate of quantity becomes essential; and if it be given at a certain amount, qualified by any of these words of indefinite estimate, the courts will construe these words as serving to protect the vendor from liability for slight and unimportant variations in quantity from the given estimate. They do not protect the vendor from lia-

<sup>1</sup> *Waddington v. Oliver*, 2 B. & P. N. R. 61; 1 Comyn Dig. Action F. 2; *Oxendale v. Wetherell*, 9 B. & C. 386; *Haines v. Tucker*, 50 N. H. 307. See *Catlin v. Tobias*, 26 N. Y. 217 (84 Am. Dec. 183).

<sup>2</sup> *Brawley v. United States*, 96 U. S. 168; *McLay v. Perry*, 44 L. T. (n. s.) 152. In the last case there was a sale of a heap of scrap-iron by one who was not a regular dealer in such goods. The estimate as to quantity was 150 tons, while the heap turned out to contain only 44 tons. The contract was construed to be a sale of that particular heap and not of 150 tons of iron more or less. See, also, *McConnell v. Murphy*, L. R. 5 C. C. 203, where the sale was of “all of the spars manufactured by A. say about 600, averaging 16 inches; the above spars will be out of the lot manufactured by I. B.,” and a tender of 496 spars was held to be a substantial performance of the contract. See, also, *Leeming v. Snath*, 16 Q. B. 275; *Hayward v. Scougall*, 2 Camp. 56; *Barker v. Windle*, 6 E. & B. 675.

bility for material and important excesses and deficiencies in number or quantity.<sup>1</sup> But what is to be deemed an important and material variation depends upon the facts of each case, no general rule being at hand, whereby to determine it.<sup>2</sup>

It has been held that these words of indefinite estimate will be implied, wherever it is the commercial usage to insert them, as a protection to the vendor against accidental variations in quantity.<sup>3</sup>

§ 103. **Delivery by installments.**—The contract may call for delivery of the goods in installments, and in that case all the installments must be delivered within the stipulated time; and if there be no specially stipulated time, then within a reasonable time.<sup>4</sup> If the vendor should fail

<sup>1</sup> "More or less," *Cross v. Eglin*, 2 B. & Ad. 106; *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440 (26 L. J. C. P. 194); *Holland v. Rea*, 49 Mich. 218; *Day v. Cross*, 59 Tex. 595, 604; *Creighton v. Comstock*, 27 Ohio St. 548. "About," *Bourne v. Seymour*, 16 C. B. 387; *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589; *Clapp v. Thayer*, 112 Mass. 296. "Say about," *McConnell v. Murphy*, L. R. 5 P. C. 203; *Morris v. Levison*, 1 C. P. D. 155; *Gwillim v. Daniell*, 2 C. M. & R. 65; 5 Tyr. 644; *Leeming v. Snath*, 16 Q. B. 275; *Barker v. Windle*, 6 E. & B. 675; *Hayward v. Scougall*, 2 Camp. 56; *Shepard v. Lynch*, 26 Kan. 377; *Tamvaco v. Lucas*, 1 El. & E. 581. "Average weight," *Cash v. Hinkle*, 36 Iowa, 623.

<sup>2</sup> See *Brawley v. United States*, 96 U. S. 168, 171; *Robinson v. Noble*, 8 Pet. 181. In *Cross v. Eglin*, 2 B. & Ad. 106 (sale of 300 quarters of rye, and 50 quarters of wheat, deliver 345 quarters of rye and 91 of wheat); *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; 26 L. J. C. P. 194 (contract for 100 tons of coal, delivered, 127 tons); *Morris v. Levison*, 1 C. P. D. 155 (contract for "a full and complete cargo of iron ore, say about 1,100 tons." Delivered 1,080 tons, whereas capacity of ship was 1,210 tons), the courts held the variation to be material.

<sup>3</sup> *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310.

<sup>4</sup> See, generally, *Mersey Steel, &c., Co. v. Naylor*, L. R. 9 App. Cas. 484; *Houck v. Muller*, L. R. 7 Q. B. D. 92; *Johnson v. Allen*, 78 Ala. 887 (56 Am. Rep. 34); *Blackburn v. Reilly*, 47 N. J. L. 290 (54 Am. Rep. 159); *Gill v. Benjamin*, 64 Wis. 362 (54 Am. Rep. 619); *Norrington v. Wright*, 115 U. S. 188. See, also, as to the effect of modifications of terms of the contract on the obligation to deliver within a reasonable

to complete the delivery, after a delivery of one or more of the installments, the buyer is not obliged to retain the installments already delivered, but he may return them, and thus relieve himself from all liability for the price.<sup>1</sup> But this rule obtains only when there is but one entire contract for the sale of goods, to be delivered in installments. If the transaction consists of two or more severable contracts, a failure to deliver under one contract has no effect on the rights of the parties under another contract.<sup>2</sup>

§ 104. **Form of delivery—Actual and constructive delivery.**—Where the sale is of unspecified goods, the goods must first be prepared for delivery by a selection and separation from the general mass.<sup>3</sup> But where the sale is of specific goods, there is ordinarily nothing to do, by the way of preparation for delivery. Still, whatever in the matter of preparation is necessary, must, of course, in any case, be done within the required time. The seller must, of course, observe every requirement that the contract makes of him in the matter of delivery and preparation, and in the solution of all doubtful questions, a reasonable construction is adopted.<sup>4</sup> And a well-established usage in respect to the duties of the seller is generally permitted to control the construction.<sup>5</sup>

time, *Davis v. Budd*, 60 Iowa, 144; *Tyers v. Rosedale, &c., Iron Co.*, L. R. 10 Ex. 195; *Ireland v. Livingston*, L. R. 5 H. L. 395; *O'Neill v. James*, 43 N. Y. 84; *Hill v. Blake*, 97 N. Y. 216; *Bergheim v. Iron Co.*, L. R. 10 Q. B. 319; *Neldon v. Smith*, 86 N. J. L. 148.

<sup>1</sup> See *Klein v. Tupper*, 52 N. Y. 550; *Oxendale v. Wetherell*, 9 B. & C. 386; *Haines v. Tucker*, 50 N. H. 307; *Catlin v. Tobias*, 26 N. Y. 217 (84 Am. Dec. 183).

<sup>2</sup> See *Verkamp v. Hubbard Co.*, 58 Cal. 229 (41 Am. Rep. 265); *Couston v. Chapman*, L. R. 2 H. L. S. App. 250.

<sup>3</sup> See *ante*, § 88.

<sup>4</sup> *Robinson v. United States*, 13 Wall. 363; *Metz v. Albrecht*, 52 Ill. 491.

<sup>5</sup> *Robinson v. United States*, 13 Wall. 363, where a usage was proven to deliver grain in sacks, where the parties had not stipulated differently.

Where a place of delivery is mentioned in the contract, unless there is an express agreement to the contrary, the seller is to bear all the expenses attending the transportation to that place.<sup>1</sup>

It has been already explained when the vendor is required to make an actual delivery, in order to pass title.<sup>2</sup> The general rule is that where he is not obliged to make this delivery, he fully performs the contract of sale when he has the goods ready for the buyer in season, and takes reasonable care of them, until the buyer comes and takes them away.<sup>3</sup> But, where there has been no actual transfer of possession, the action by the vendor is for goods bargained and sold, and not for goods sold and delivered.<sup>4</sup> Wherever there is a manual or bodily transfer of possession, the delivery is called actual. And wherever that is possible, while there may be a constructive delivery, sufficient to

See, also, to same effect, *Cole v. Kew*, 20 Vt. 21. But see *Groat v. Gile*, 51 N. Y. 481, where evidence was held to be inadmissible, in order to prove a usage for the vendor of sheep to shear them before delivery, and to appropriate the wool.

<sup>1</sup> *Playford v. Mercer*, 22 L. T. (N. S.) 41, where a cargo was sold, "from the deck," and it was held that the seller should pay everything necessary to enable the buyer to remove the cargo from the deck.

<sup>2</sup> See *ante*, § 84.

<sup>3</sup> *Bissell v. Balcom*, 39 N. Y. 275; *Wade v. Moffit*, 21 Ill. 110 (74 Am. Dec. 79); *Kohl v. Lindley*, 39 Ill. 195; *Damon v. Osborn*, 1 Pick. 476; *Coon v. Spaulding*, 47 Mich. 162; *Morse v. Sherman*, 106 Mass. 480; *Frazier v. Simmons*, 139 Mass. 531.

<sup>4</sup> *Sterns v. Washburn*, 7 Gray, 187; *Turner v. Langdon*, 112 Mass. 265; *Allingham v. O'Mahoney*, 1 Pugs. 326; *Morse v. Sherman*, 106 Mass. 480; *Frazier v. Simmons*, 139 Mass. 531; *Hart v. Tyler*, 15 Pick. 171; *Bement v. Smith*, 15 Wend. 493; *Messer v. Woodman*, 22 N. H. 173; *Atwood v. Lucas*, 53 Me. 508; *Specers v. Harvey*, 7 R. I. 582; *Warden v. Marshall*, 99 Mass. 306. But see *Ross v. Welch*, 11 Gray, 235; *Stern v. Filene*, 14 Allen, 9; *Hart v. Summers*, 38 Mich. 399, where the distinction between the action for goods *sold and delivered* and that for goods *bargained and sold*, were not so strictly observed. It need not be more than stated, that these distinctions disappear altogether under all the American codes of procedure, which were patterned after the New York Code.

pass title between the parties, nothing but actual delivery will be sufficient to make an effective transfer as to third parties.<sup>1</sup> But where, for any reason, actual delivery becomes impossible, the law will imply a delivery, if the intention of the parties to transfer title and possession be manifest. This is called constructive delivery. Thus, whenever the goods are already in the possession of the vendee, any formal delivery becomes impossible, and the transfer of title takes effect in consequence of the agreement and understanding that the relation of the party having possession has been changed from that of bailee to that of vendee and absolute owner. If any delivery can be predicated of such a transaction at all, it would be a constructive or implied delivery.<sup>2</sup>

So, also, where the purpose of the parties is that the vendor shall retain possession of the goods after the sale, in the capacity of a bailee of some sort, the agreement for the vendor to retain possession of the goods sold makes an actual delivery impossible, and the law implies a delivery from a change in the character of the vendor's possession.<sup>3</sup>

<sup>1</sup> Delivery of a bill of sale, *Burge v. Cone*, 6 Allen, 412; *Dempsey v. Gardner*, 127 Mass. 381 (84 Am. Rep. 388); *Carter v. Willard*, 19 Pick. 1; *Packard v. Wood*, 4 Gray, 307; *Veazie v. Somerby*, 5 Allen, 280; *Bullard v. Wait*, 16 Gray, 55; *Ingalls v. Herrick*, 108 Mass. 351; *Dugan v. Nichols*, 125 Mass. 43; *Hardy v. Potter*, 10 Gray, 89; *Thorndike v. Bath*, 114 Mass. 116 (19 Am. Rep. 318); *Chapman v. Searle*, 3 Pick. 38; *Rourke v. Bullens*, 8 Gray, 549; *Shumway v. Rutter*, 7 Pick. 56, 59 (19 Am. Dec. 340); *Solomons v. Chesley*, 58 N. H. 288.

<sup>2</sup> *Shurtleff v. Willard*, 19 Pick. 210; *Lake v. Morris*, 30 Conn. 201; *Nichols v. Patten*, 18 Me. 281; *Warden v. Marshall*, 99 Mass. 308; *Stowe v. Taft*, 58 N. H. 444; *Griffin v. Wright*, 1 Tex. App. (Civ. Cas.), § 638. The same rule obtains in sales from one tenant in common to another in possession of the goods. See *Beaumont v. Crane*, 14 Mass. 400; *Kittredge v. Summer*, 11 Pick. 50; *Macomber v. Parker*, 13 Pick. 175; *Cushing v. Breed*, 14 Allen, 376.

<sup>3</sup> *Shumway v. Rutter*, 8 Pick. 447; *Stinson v. Clark*, 6 Allen, 340; *Mount Hope Iron Co. v. Buffinton*, 108 Mass. 62; *Bates v. Conklin*, 10 Wend. 390; *Ropes v. Lane*, 11 Allen, 591; *Hobbs v. Carr*, 127 Mass. 532; *Cartwright v. Phoenix*, 7 Cal. 281; *Thorndike v. Bath*, 114 Mass. 116;

So, also, where the goods are at the time of sale in the possession of a warehouseman, the title and possession passes without actual delivery, on giving notice to the bailee of the change of ownership<sup>1</sup>—so, likewise where the goods are beyond the reach of the vendor, thus rendering an actual delivery impossible, as where a vessel and cargo are at sea;<sup>2</sup> where delivery is impossible, because the goods are of ponderous weight,<sup>3</sup> or because they are growing crops, and must remain in the soil until they are ripe for harvest.<sup>4</sup> A grow-

*Ingalls v. Herrick*, 108 Mass. 351; *Hardy v. Potter*, 10 Gray, 89; *Webster v. Anderson*, 42 Mich. 554 (36 Am. Rep. 452); *Pratt v. Maynard*, 116 Mass. 388; *Means v. Williamson*, 37 Me. 556; *Barrett v. Goddard*, 8 Mason, 107; *Merrill v. Parker*, 24 Me. 89. As to the effect of retention of actual possession on the rights of attaching creditors, see *ante*, § 40a, and *post*, § 106.

<sup>1</sup> *Salter v. Woollams*, 2 M. & G. 650; *Smith v. Chance*, 2 B. & Ald. 753; *Wood v. Manley*, 11 A. & E. 34; *Bentall v. Burns*, 3 B. & C. 423; *Tuxworth v. Moore*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Stow v. Taft*, 58 N. H. 445; *Campbell v. Hamilton*, 63 Iowa, 293. Whether it is necessary for the bailee to consent to keep the goods for the buyer has been decided both in the affirmative and negative. That it is not necessary, see *Carter v. Willard*, *supra*; *Bailey v. Quint*, 22 Vt. 474; *Pettingill v. Elkins*, 50 Vt. 431. See, also, *Potter v. Washburn*, 13 Vt. 558; *Montgomery v. Hunt*, 5 Cal. 366; *Hatch v. Bayley*, 12 Cush. 27; *Hatch v. Lincoln*, 12 Cush. 81. See, also, apparently *contra*, *Gill v. Frank*, 12 Oreg. 507.

<sup>2</sup> But, in the case of the sale of a vessel or of its cargo at sea, actual possession must be taken of them as soon as they arrive in port, or within a reasonable time thereafter. *Bellam v. Tucker*, 1 Pick. 389; *Joy Sears*, 9 Pick. 4; *Brinley v. Spring*, 7 Greenl. 241; *Turner v. Coolidge*, 2 Met. 350; *Meeker v. Wilson*, 1 Gall. 419; *Dawes v. Cope*, 4 Binn. 258; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Putnam v. Dutch*, 8 Mass. 287.

<sup>3</sup> *Jewett v. Warren*, 12 Mass. 300; *Van Brunt v. Pike*, 4 Gill, 270; *Hayden v. Demets*, 53 N. Y. 426; *Ruffer v. United States*, 15 Ct. of Cl. 291; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Toguini v. Kyles*, 17 Nev. 209 (45 Am. Rep. 442); *Thompson v. Balt. & Ohio R. R.*, 28 Md. 396; *Leonard v. Davis*, 1 Black, 476; *Kingley v. White*, 57 Vt. 565.

<sup>4</sup> *Graff v. Fitch*, 58 Ill. 373; *Thompson v. Wilhite*, 81 Ill. 357; *Ticknor v. McClelland*, 84 Ill. 471; *Bellows v. Wells*, 36 Vt. 600. On the ground that the products of the soil cannot become the subject of a sale of personalty until they have ceased to be real property by a severance from the soil, the courts have distinguished somewhat between the *fructus naturales*, and the *fructus industriales*, holding more strictly in the

ing crop could not be delivered unless the land was also transferred; and the transaction would then become a sale of real property, instead of being a sale of personalty.<sup>1</sup>

§ 105. **Symbolical delivery**, — being one species of constructive delivery, differs from the other kinds, in that it is a delivery of one thing as the representative of, and in lieu of, another, which latter is the subject of the sale, and is therefore to be transferred. The title to the goods, as well as the possession of them, will pass by means of the symbolical delivery. While the transfer of a symbol is not necessary in those cases, where constructive delivery is permitted on account of the impracticability of an actual delivery,<sup>2</sup> yet the symbolical delivery may be and is generally used in such cases, because it affords more positive evidence of a transfer of possession than what is given in the other forms of constructive delivery. Thus, the following are recognized by the law as effective symbolical deliveries: the bill of sale of a vessel and cargo, at sea, and in all other cases of impracticable delivery;<sup>3</sup> the bill

former cases that there must at least be a severance, before title and possession can pass, unless the land itself was conveyed. *Stone v. Peacock*, 35 Me. 386; *Yale v. Seely*, 15 Vt. 221; *Lamson v. Patch*, 5 Allen, 586. See *ante*, § 59, and also *Tiedeman on Real Property*, § 799. See also *Davis v. McFarlane*, 37 Cal. 638; *Robbins v. Oldham*, 1 Duvall (Ky.), 28; *Cummins v. Griggs*, 2 Duvall (Ky.), 87; 5 Bush, 335.

<sup>1</sup> See *Noble v. Smith*, 2 Johns. 56; *Smith v. Chapney*, 50 Iowa, 174; *Branton v. Griffiths*, 2 C. P. D. 212. See, also, *ante*, § 59; *Tiedeman on Real Prop.*, § 799.

<sup>2</sup> See *ante*, § 104.

<sup>3</sup> *Gardner v. Howland*, 2 Pick. 602; *Atkinson v. Malling*, 2 T. R. 48; *Portland Bank v. Stacey*, 4 Mass. 661; *Putnam v. Dutch*, 8 Mass. 287. Property in possession of a bailee, *Keil v. Harris*, 6 Atl. Rep. ; Goods of ponderous weight, *Jewitt v. Warren*, 12 Mass. 300, *Leonard v. Davis*, 1 Black. 476. But where the actual possession is transferred, the bill of sale is useless, except as written evidence of the contract of sale. *Gatzweiler v. Morgner*, 51 Mo. 37; 2 *Schouler Personal Prop.*, § 392. And whenever the bill of sale is delivered with intention of passing title, it will have that effect, as between the parties to the con-



of lading for goods in course of transportation;<sup>1</sup> the warehouse receipts, delivery orders, dock-warrants, or other acknowledgment by a bailee of an obligation to deliver goods, which had been consigned to his care, upon the order or indorsement of the depositor;<sup>2</sup> the key of the warehouse, in which the goods were stored.<sup>3</sup> A delivery or tender of any one of these documents of title may be a good defense to an action for non-delivery of the goods sold.<sup>4</sup>

§ 106. What delivery is sufficient as against creditors and subsequent purchasers. — It has been already ex-

tract. *Philbrook v. Eaton*, 134 Mass. 398; *Parson v. Dickinson*, 11 Pick. 352; *Packard v. Wool*, 4 Gray, 307. But see *Harlow v. Hall*, 132 Mass. 282, as to effect on innocent purchasers.

<sup>1</sup> *First Nat. Bank v. McAndrews*, 5 Mont. 328 (51 Am. Rep. 51); *Allen v. Jones*, 24 Fed. Rep. 11; *Gibson v. Stevens*, 8 How. 384; *Davis v. Russell*, 52 Cal. 611 (28 Am. Rep. 647); *Russell v. O'Brien*, 127 Mass. 340; *Prickett v. Read*, 31 Ark. 131; *King v. Jarman*, 35 Ark. 190; *Pratt v. Parkman*, 24 Pick. 42; *Buffington v. Curtis*, 15 Mass. 528; *Peters v. Ballistier*, 3 Pick. 495; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; *Quintard v. Bacon*, 99 Mass. 185.

<sup>2</sup> *Chaplin v. Rogers*, 1 East, 192; *Harman v. Anderson*, 2 Camp. 243; *Atkinson v. Maling*, 2 T. R. 462; *Manton v. Moore*, 7 T. R. 67; *Pleasants v. Pendleton*, 6 Randolph, 473; *Van Blunt v. Pike*, 4 Gill, 270; *Chapman v. Searle*, 3 Pick. 38; *Tuxworth v. Moore*, 9 Pick. 347, 349; *Pratt v. Parkman*, 24 Pick. 46, 47; *Horr v. Barker*, 8 Cal. 609; *Glasgow v. Nicholson*, 25 Mo. 29; *Mitchell v. McLean*, 7 Fla. 329; *Whitaker v. Sumner*, 20 Pick. 405; *Adams v. Foley*, 4 Iowa, 44; *Gill v. Frank*, 12 Oreg. 507; *Bentall v. Burn*, 3 B. & C. 423; *Hollingsworth v. Napier*, 3 Caines, 182; *Wilkes v. Ferris*, 5 Johns. 335. The consent of the bailee to the transfer or at least notice to him, has been held to be essential to make the transfer of the receipt a sufficient delivery. See *Gill v. Frank*, 12 Oreg. 507; *Hallegarten v. Oldham*, 135 Mass. 1. Also, *ante*, §§ 7, 104.

<sup>3</sup> *Packard v. Dunsmore*, 11 Cush. 282; *Vining v. Gilbreth*, 39 Me. 496; *Chappel v. Marvin*, 2 Aikens, 79; *Wilkes v. Ferris*, 5 Johns. 335.

<sup>4</sup> *Salter v. Woodlams*, 2 Man. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34; *Davis v. Jones*, 3 Houst. 68; *Gibson v. Stevens*, 8 How. 399; *McKee v. Garcelon*, 60 Me. 167 (11 Am. Rep. 200); *Russell v. Carrington*, 42 N. Y. 118 (1 Am. Rep. 498); *Hayden v. Demets*, 53 N. Y. 426.

plained<sup>1</sup> that delivery is essential to a transfer of the title of goods sold, as against creditors and subsequent purchasers, and that the retention of possession is at least *prima facie*, if not conclusive, evidence of fraud, sufficient to avoid the sale in favor of the attaching creditor or subsequent purchaser. But this rule of law is never enforced in so narrow a spirit as to require the parties to the contract to do an impossible thing, and hence the question, whether there has been a sufficient delivery as against creditors and subsequent purchasers, must be considered and answered in the light of the particular facts of each case. Where, of course, the retention of possession by the vendor is held to be only *prima facie* evidence of fraud, proof of good faith readily removes the difficulty; but in any case the title is generally held to vest absolutely in the vendee, wherever constructive or symbolical delivery is held to be a sufficient substitute for an actual manual transfer of possession.<sup>2</sup> Thus, actual delivery is not required as against creditors, where the goods are for any reason not susceptible of a manual transfer of possession. The constructive possession which the law implies in such cases, is held to be sufficient.<sup>3</sup> So, also, where goods are in the possession of a bailee.<sup>4</sup> But in that case notice to third

<sup>1</sup> See *ante*, § 84a.

<sup>2</sup> See *ante*, §§ 104, 105.

<sup>3</sup> "Growing crops," *Robbins v. Oldham*, 1 Duv. 29; *Cummings v. Griggs*, 2 Duv. 87; *Morton v. Ragan*, 5 Bush, 335; "Ponderous articles," *Broadwell v. Howard*, 77 Ill. 305; *Jewett v. Warren*, 12 Mass. 300; *Davis v. Ransom*, 18 Ill. 396; *Wright v. Grover*, 27 Ill. 426; *Hart v. Wing*, 44 Ill. 141; *Simmons v. Jenkins*, 76 Ill. 479; *Webster v. Granger*, 78 Ill. 230; *Lefever v. Mires*, 81 Ill. 456; *Johnson v. Holloway*, 82 Ill. 334; *Ticknor v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Ill. 388; *Goodheart v. Johnson*, 88 Ill. 58; *Richardson v. Rardin*, 88 Ill. 124; *Dunlap v. Eppler*, 88 Ill. 82; *Greenebaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, 90 Ill. 376; *Rozler v. Williams*, 92 Ill. 187; *Clow v. Woods*, 5 S. & R. 275; *Kingsley v. White*, 57 Vt. 565.

<sup>4</sup> *Linton v. Butz*, 7 Pa. St. 89; *Worman v. Cramer*, 78 Pa. St. 378; *Woods v. Hull*, 81 Pa. St. 451.

persons in possession of property is essential to perfect the sale.<sup>1</sup>

It is not necessary to repeat the enumeration of the cases in which the constructive and symbolical deliveries may be taken as substitutes of actual delivery. It will be sufficient to refer the reader to the preceding paragraphs.<sup>2</sup> Most of the illustrations, which are given there, of constructive and symbolical deliveries, are applicable in the determination of their effect on the rights of creditors and subsequent purchasers, as well as to the question of full performance of the contract. In the case of creditors, the transfer is required to be more notorious.

The most important, as well as most doubtful, question in this connection, is whether there is a sufficient constructive delivery to avoid the presumption of fraud on creditors, where the vendor retains possession of the goods as bailee of the vendée. Where the statutes expressly require an actual and continued change of possession, it would be very doubtful, except in the plainest and most notorious cases, whether there was a sufficient delivery. The authorities are not uniform, some holding that there would be a sufficient delivery under those facts, and this would seem to be the correct, as well as the more reasonable, rule.<sup>3</sup> On the other hand, there are some authorities which hold that there is not a sufficient delivery, where the vendor retains possession

<sup>1</sup> *Tuxworth v. Willard*, 9 Pick. 347; *Carter v. Willard*, 19 Pick. 1; *Hardy v. Potter*, 10 Gray, 89; *Whitney v. Lynch*, 16 Vt. 579.

<sup>2</sup> See *ante*, §§ 104, 105.

<sup>3</sup> *Hobbs v. Carr*, 27 Mass. 532; *Phelps v. Cutler*, 4 Gray, 137; *Green v. Rowland*, 16 Gray, 58; *Stinson v. Clark*, 6 Allen, 340; *Cushing v. Breed*, 14 Allen, 376; *Ingalls v. Herrick*, 108 Mass. 351; *Russell v. O'Brien*, 127 Mass. 349; *Goodheart v. Johnson*, 88 Ill. 58; *Smith v. Crisman*, 91 Pa. St. 428; *Steele v. Miller*, 1 Atl. Rep. (Pa.) 434; *Campbell v. Hamilton*, 63 Iowa, 393; *Williams v. Lerch*, 56 Cal. 330; *Montgomery v. Hunt*, 5 Cal. 366 (cattle left in charge of vendor's agent as bailee of the buyer); *Walden v. Murdock*, 23 Cal. 533 (where cattle were branded by the buyer); *Evans v. Scott*, 89 Pa. St. 136 (carpet bought but left in the same place to be used by buyer jointly with vendor.)

as bailee of the buyer.<sup>1</sup> But where the retention of possession by the vendor is accompanied by distinct and notorious acts of ownership on the part of the buyer, as where the goods are kept in the same place, but the sign is changed, the delivery is sufficient.<sup>2</sup> So also the branding of cattle,<sup>3</sup> and the nailing up holes in a corn-crib.<sup>4</sup> On the other hand, there is not a sufficient possession, where the old sign is retained over the door of the shop.<sup>5</sup>

In very many cases, the facts have been held sufficiently doubtful, whether there has been a sufficient change of possession to make the sale valid against creditors and subsequent purchasers, in order to submit the question to the jury.<sup>6</sup>

§ 107. **Second delivery permissible, when first is defective.** — If the first attempt at delivery proves unsuccessful, a second delivery may be made, and it will be just as effective as if it had been done right in the first instance, provided the time of performance had not yet expired.<sup>7</sup>

<sup>1</sup> *Ruddle v. Givens* (Cal.), 18 Pac. Rep. 421; *Betz v. Franz*, Pa. St. (18 Atl. Rep. 940); noted in 27 Cent. L. J. 19; *Oro, etc., Co. v. Starr* (Cal.), 8 Pac. Rep. 242; *Stevens v. Irwin*, 15 Cal. 503; *Bassinger v. Spoulger*, 9 Col. 175.

<sup>2</sup> *Cook v. Mann*, 6 Col. 21.

<sup>3</sup> *Walden v. Murdock*, 23 Cal. 533.

<sup>4</sup> *Pope v. Cheney*, 68 Iowa, 562.

<sup>5</sup> *Brown v. Kimmel*, 67 Mo. 430; *Woods v. Bugbey*, 29 Cal. 466; *Lawrence v. Burnham*, 4 Nev. 361; *Hull v. Sigsworth*, 48 Conn. 258; *Clafin v. Rosenberg*, 42 Mo. 449; *Perrin v. Reed*, 35 Vt. 2; *Pierce v. Chipman*, 8 Vt. 337.

<sup>6</sup> *Rafferty v. McKenna* (Pa. St.) 1 Atl. Rep. 546 (stenciling vendee's name on sides of cars); *Wolf v. Kahn*, 62 Miss. 814 (business carried on in same name); *Parker v. Muwell*, 60 N. H. 80 (wagon left in seller's possession); *Ziegler v. Hendrick*, 106 Pa. St. 57 (horse, etc., kept in barn of seller's house); *Brown v. Kimmel*, 67 Mo. 430; *Evans v. Scott*, 89 Pa. St. 136 (leaving carpets in brother's house); *Ross v. Sedgwick*, 69 Cal. 247 (brother's control of furniture in lodging-house); *O'Gara v. Lowry*, 5 Mont. 427 (brother driving team which he had sold); *Leavitt v. Jones*, 54 Vt. 423 (41 Am. Rep. 849) (sale by husband to wife); *McClure v. Tomey*, 107 Pa. St. 414 (sale by father to daughter).

<sup>7</sup> *Borrowman v. Free*, 4 Q. B. D. 500, C. A.

§ 108. **Rescission of sale, — rights of vendee's creditors.** — If the parties to a sale, which has been once completed by a delivery, agree to rescind the sale, as much formality will be required to re-vest the title in the vendor, as against the vendee's creditors, as was necessary to transfer the title to the vendee.<sup>1</sup> But there will be a sufficient constructive re-delivery, if after the rescission of the sale, the buyer retains the goods solely for the purpose of making repairs for the vendor.<sup>2</sup>

§ 109. **Delivery incomplete without acceptance.** — Delivery and acceptance, are concurrent acts, one supplementary to the other, so that there cannot be a full performance of a contract of sale, until the goods sold had been both delivered and accepted. Acceptance constitutes the subject of the next chapter.

<sup>1</sup> Quincy v. Tilton, 5 Me. 277; State of Maine v. Intoxicating Liquors, 61 Me. 520; Gleason v. Drew, 9 Me. 81.

<sup>2</sup> Beecher v. Mayall, 16 Gray, 276. See also Parks v. Hall, 2 Pick 206.

## CHAPTER IX.

### ACCEPTANCE.

**SECTION 112. Acceptance and delivery concurrent acts — Effect of want of acceptance.**

113. When buyer obliged to accept — Buyer's duties in acceptance of the goods.

114. Receipt and acceptance distinguished — Right of inspection of goods.

115. What constitutes acceptance — Right of inspection and rejection of goods.

116. Acceptance, where delivery is by installments.

117. Acceptance final — Right of rejection barred by acceptance.

**112. Acceptance and delivery concurrent acts — Effect of want of acceptance.** — It is generally stated that acceptance and delivery are concurrent acts; and this is true so far that delivery without acceptance, actual or presumed, does not transfer an absolute title to the goods. And until acceptance of the goods, the buyer is at liberty to take exception to the quality, character or quantity of the goods delivered and reject them on that account. But proof of acceptance is not necessary for the transfer of the title, and in order to throw the risk of loss on the buyer. The vendor may recover for "goods sold and delivered," as well as for "goods bargained and sold" without proving any actual acceptance.<sup>1</sup>

**§ 113. When buyer obliged to accept — Buyer's duties in acceptance of the goods.** — Since acceptance and delivery are concurrent and supplemental acts, the buyer is

<sup>1</sup> *Nichols v. Morse*, 100 *Morse*, 523; *Barton v. McKelway*, 22 *N. J. L.* 165.

required to accept the goods, when the seller has done every thing that can be required of him as preliminary to an acceptance. If the seller is required only to make the goods ready for delivery, and the buyer is to come or send for them, it is a part of the buyer's duty of acceptance to take the goods away from the seller's warehouse or place of business. The vendor, in such cases, need not in his action for the price aver or prove any thing more than that he was ready and willing to deliver the goods on payment of the price.<sup>1</sup> But the vendor must notify the buyer that the goods are ready for delivery before the buyer can be said to be in fault.<sup>2</sup> When, however, he has been notified, the buyer must remove the goods, and if he fails to do so within a reasonable time,<sup>3</sup> he becomes liable to the seller for warehouse rent and other charges for the continued custody of the goods, and for any other damage which the seller might have incurred in consequence of the delay in the removal of the goods.<sup>4</sup>

But the buyer is not obliged to accept the goods, unless they have been tendered to him exactly in accordance with the terms of the contract. In other words, the require-

<sup>1</sup> *Jackson v. Alloway*, 6 Man. & G. 942; *Lawrence v. Knowles*, 5 Bing. N. C. 899; *Spotswood v. Barrow*, 1 Ex. 804; *Baker v. Firminger*, 28 L. J. Ex. 130; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; *Medina v. Norman*, 9 Mees. & W. 820; *Boyd v. Lett*, 1 Con. B. 222; *Raffae v. United States*, 15 Ct. of Cl. 291; *Nichols v. Morse*, 100 Mass. 523; *Washburn Iron Co. v. Russell*, 130 Mass. 543; *Wright v. Weed*, 6 Up. Can. Q. B. 140; *Supple v. Gilmour*, 5 Up. Can. C. P. 318; *Sedgwick v. Cottingham*, 54 Iowa, 512; *Pacific Iron Works v. Long Island R. R. Co.*, 62 N. Y. 272.

<sup>2</sup> *Jones v. Gibbons*, 8 Ex. 920. See *Cameron v. Wells*, 30 Vt. 633; *Edwards v. Hart*, 66 Ill. 71.

<sup>3</sup> What is a reasonable time is always a question for the jury under all the circumstances of the case. *Buddle v. Green*, 3 Hurl. & N. 906; 27 L. J. Ex. 33. See also as to reasonable time, *Howe v. Huntington*, 15 Me. 350; *Stange v. Wilson*, 17 Mich. 342; *Conn. v. Spaulding*, 47 Mich. 162; *Bass v. White*, 63 N. Y. 565; *Pinney v. St. Paul R. R. Co.*, 19 Minn. 251.

<sup>4</sup> *Greaves v. Ashlin*, 3 Camp. 426; *Bloxam v. Sanders*, 4 Barr. & C. 941; *Denman v. Cherokee Iron Co.*, 56 Ga. 819

ments of the law as to delivery, must be observed by the seller, before the buyer is obliged to accept.<sup>1</sup> If, for example, the seller has failed to make the proper delivery, either because he has made it at an unseasonable time of the day<sup>2</sup> or he has failed to deliver the exact quantity of goods delivered neither more nor less, nor mixed with other goods,<sup>3</sup> or he has delivered less than the required quantity,<sup>4</sup> or has not delivered in the form, called for by the contract of sale;<sup>5</sup> in every such case, the buyer may refuse to accept the goods, and relieve himself from all liability by rejecting them, and notifying the vendor of the rejection. The buyer is of course not obliged to accept the goods, until he has had an opportunity to inspect and examine them. But this brings us to the subject of another paragraph.

§ 114. **Receipt and acceptance distinguished — Right of inspection of goods.** — Receipt and acceptance are not altogether identical, although the latter includes the former. A receipt of the goods constitutes a mere taking of the goods into one's actual or constructive possession.<sup>6</sup> But acceptance includes, in addition to receipt, the intention to retain them in performance of the contract of sale. If the

<sup>1</sup> For a full discussion of the requirements of the law in respect to delivery, see chapter VIII.

<sup>2</sup> *Startup v. McDonald*, 6 Man. & G. 593.

<sup>3</sup> The buyer is not obliged to select the goods he ordered from others shipped in the same package without being ordered. *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Levy v. Green*, 8 El. & B. 575; 1 El. & E. 969; 27 L. J. Q. B. 111; 28 L. J. Q. B. 319; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620; 35 L. J. Q. B. 176.

<sup>4</sup> *Corrigan v. Sheffield*, 10 Hun, 227; *Bruce v. Pearson*, 3 Johns. 534; *Kein v. Tupper*, 52 N. Y. 553; *Solomon v. Neidig*, 1 Daly, 200.

<sup>5</sup> *Makin v. London Rice Mills Co.*, 20 L. T. (N. S.) 705; *Playford v. Mercer*, 22 L. T. (N. S.) 41; *Cole v. Kew*, 20 Vt. 21; *Robinson v. United States*, 13 Wall. 363; *Great v. Gile*, 51 N. Y. 431.

<sup>6</sup> See *ante*, §§ 61-70 for a full discussion of what constitutes acceptance and receipt of goods, sufficient to satisfy the requirement of the Statute of Frauds.



vendee has, before receipt of the goods, had an opportunity to inspect and examine them, and has declared his satisfaction with them, receipt of the goods will include acceptance.<sup>1</sup> But where the vendee has not had an opportunity to inspect and examine the goods, as for example where they are sold by sample, there can be no acceptance in full performance of the contract, resulting from the receipt of the goods, until a reasonable time has elapsed after delivery and receipt, in which to examine the goods and accept or reject them.<sup>2</sup> But the right of inspection of goods, after receipt of them, may be limited or taken away altogether by agreement of the parties or by commercial custom.<sup>3</sup>

§ 115. What constitutes acceptance — Right of inspection and rejection of goods. — Since the acceptance is itself an operation of the mind, it must be communicated or manifested to others before it can become a legal fact. Of course, these manifestations may be by word or deed.<sup>4</sup>

<sup>1</sup> *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Saunders v. Topp*, 4 Ex. 390; *Bill v. Bament*, 9 M. & W. 86; *Proctor v. Jones*, 2 C. & P. 532; *Boulter v. Amott*, 1 C. & M. 334; *Baldey v. Parker*, 2 B. & C. 87; *Hodson v. LeBret*, 1 Camp. 233.

<sup>2</sup> *Shields v. Reibe*, 9 Bradw. 598; *Rew v. Lawrence*, 27 Up. Can. C. P. 402; *Corrigan v. Sheffield*, 10 Hun, 227; *Croninger v. Crocker*, 62 N. Y. 151; *Pease v. Copp*, 67 Barb. 132; *Raffee v. United States*, 15 Ct. of Cl. 291; *Lorymer v. Smith*, 1 Barn. & C. 1; *Coustor v. Chapman*, L. R. 2 H. L. S. 250; *Doane v. Dunham*, 79 Ill. 131. And this right of inspection before acceptance, obtains in the case of the sale of specific goods, as in that of non-specific goods. See *Isherwood v. Whitmore*, 10 M. & W. 757; But see, apparently *contra*, *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.

<sup>3</sup> *Pettitt v. Mitchell*, 4 M. & G. 819; *Moherin v. Ball*, Cal. ; 8 Pac. Rep. 886.

<sup>4</sup> See, generally, *Pease v. Copp*, 67 Barb. 132; *Wells v. Smith*, 2 Ont. App. 8; *Knoblauch v. Krouchnabel*, 18 Minn. 300; *Delamater v. Chappell*, 48 Md. 244; *Waters Heater Co. v. Mansfield*, 48 Vt. 378; *Haynes v. Sherrer*, 2 Bradw. 536; *Belt v. Stetson*, 26 Minn. 411; *Cox v. Jones*, 24 Up. Can. Q. B. 81; *Hamilton v. Myles*, 24 Up. Can. C. P. 309; *Gowing v. Knowles*, 118 Mass. 232; *Shipman v. Graves*, 41 Mich. 675; *Pennell v.*

An express declaration of the buyer, after an examination of the goods, that he will take them is naturally the most satisfactory form of acceptance. But in the cases, in which the question as to the fact of acceptance is raised, there is ordinarily no such explicit declaration, and the acceptance is inferable only from the actions of the buyer, or from collateral facts, which are inconsistent with the absence of an intention to accept. This would be the case, wherever the buyer has done anything with or concerning the goods, which would involve the exercise of ownership over them, such as an attempted resale of them,<sup>1</sup> any change in the condition or character of them,<sup>2</sup> making use of them,<sup>3</sup> and the like.<sup>4</sup> And if his words conflict with his acts, as where the buyer says at one time that he does not expect to keep the goods, and then tries to sell them, his acts will outweigh his words in determining the question whether there has been an acceptance.<sup>5</sup> And in every such case, his words, as well as his acts, must be considered together, the court giving effect to the preponderance of evidence.<sup>6</sup>

It is also strong evidence of an acceptance of the goods, if the vendee retains them beyond a reasonable time, with-

McAfferty, 84 Ill. 864; *Gorgon v. Waterous*, 36 U. Can. Q. B. 321; *Treadwell v. Reynolds*, 89 Conn. 31.

<sup>1</sup> *Chaplin v. Rogers*,<sup>1</sup> East, 195; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Parker v. Palmer*, 4 B. & Ald. 387; *Lillywhite v. Devereux*, 15 M. & W. 285; *Baines v. Jevons*, 7 C. & P. 288; *Hill v. McDonald*, 17 Wis. 97; *Marshall v. Ferguson*, 23 Cal. 65; *Robinson v. Gordon*, 28 Up. Can. Q. B. 148; *Delamater v. Chappell*, 43 Md. 244; *Phillips v. Ocmulgee Mills*, 55 Ga. 638.

<sup>2</sup> *Parker v. Wallis*, 5 E. & B. 21. See *Maberly v. Sheppard*, 10 Bing. 99.

<sup>3</sup> *Beaumont v. Brengen*, 5 C. B. 301.

<sup>4</sup> Erle, J.: "If the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is the owner of the goods the doing of that is evidence that he has accepted them." *Parker v. Wallis*, 5 E. & B. 21. See, also, to the same effect, *Gray v. Davis*, 10 N. Y. 285; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200; *Dollard v. Botts*, 6 Allen (N. B.) 443; *Pinkham v. Mattox*, 53 N. H. 606.

<sup>5</sup> *Chapman v. Morton*, 11 M. & W. 534.

<sup>6</sup> 2 *Schouler Personal Prop.*, § 407.

out notifying the seller of his rejection of them. Unless he notifies the seller of his rejection within a reasonable time after delivery of the goods to him, the buyer is presumed to have accepted them.<sup>1</sup>

What is a reasonable time is a question of fact to be determined under all the facts of the case. Ordinarily, the buyer must give the seller a prompt and explicit notice of his rejection, and delay in doing so is only excusable when he is prevented by some overpowering obstacle<sup>2</sup> or the seller has by agreement waived the right to a prompt notice, as where he agrees to call for a notice of the buyer's decision.<sup>3</sup> But the buyer need not give the seller any very formal notice. Any notice, which is reasonable under the circumstances of the case, will be sufficient, it matters not how informal it may be. Parol notice is sufficient.<sup>4</sup>

The acceptance may be conditional upon the performance of some act by the seller, as where the seller is to make some change in the goods sold, before the buyer is willing to take them.<sup>5</sup>

But the buyer must have good grounds for rejecting the goods, in order that he may be relieved from liability for non-acceptance. He cannot reject the goods, if they suit the purpose for which they were ordered, and correspond in every particular to the terms of the contract.<sup>6</sup> In such cases, the wrongfulness of his attempt to

<sup>1</sup> *Blanchi v. Nash*, 1 M. & W. 545; *Beverley v. Lincoln Gas Light Co.*, 6 A. & E. 829; *Couston v. Chapman*, L. R. 2 Sc. App. 250; *Treadwell v. Reynolds*, 39 Conn. 31; *Hirshhorn v. Stewart*, 49 Iowa, 48; *Boughton v. Standish*, 48 Vt. 594; *Doane v. Dunham*, 79 Ill. 131; *Greenthal v. Schneider*, 52 How. Pr. 133; *Neaffle v. Hart*, 4 Lans. 4; *Walkins v. Paine*, 57 Ga. 50; *Pease v. Copp*, 67 Barb. 132; *Stafford v. Pooler*, 67 Barb. 143; *Reed v. Randall*, 29 N. Y. 358; *Henkel v. Welsh*, 41 Mich. 665.

<sup>2</sup> *Couston v. Chapman*, L. R. 2 H. L. S. 250; *Dutchers Co. v. Harding*, 49 N. Y. 321.

<sup>3</sup> *Suit v. Bonnell*, 33 Wis. 180. See *Kahn v. Klabunde*, 50 Wis. 235.

<sup>4</sup> *Grimoldby v. Wells*, L. R. 10 Com. P. 391.

<sup>5</sup> *Belt v. Stetson*, 26 Minn. 411.

<sup>6</sup> See *Boughton v. Standish*, 48 Vt. 594; *Knoblauch v. Kronschnabel*, 166.

return the goods is apparent. But when the parties have stipulated for the sale of something, provided on examination or trial it proves satisfactory to the buyer, without any specification of the qualities the thing must have in order to be satisfactory, it is difficult to determine when the buyer has exceeded his right of rejection, since the only limitation on his right of rejection in such cases is good faith in its exercise.<sup>1</sup>

§ 116. **Acceptance where delivery by installments.**—Where the delivery is, according to the terms of the contract, to be by installments, a delivery of a part of the goods, and a retention of them, after the lapse of a reasonable time, in which to make an examination and to reject them, if unsatisfactory, will preclude the buyer from a rejection of that part, on account of any defect in quality or suitability to the purposes for which it was bought.<sup>2</sup> But the buyer will not be precluded, by his acceptance of one part of inferior goods, from rejecting any other part which was delivered subsequently.<sup>3</sup> But if the seller fails in the end to deliver the full amount of goods called for by the contract, since the buyer is not obliged to receive less than the whole amount, he may return the goods already received, for his acceptance of them was conditional upon his subsequent receipt of the entire amount.<sup>4</sup>

18 Minn. 300; *Simpson v. Krumdick*, 28 Minn. 352; *Doane v. Dunham*, 79 Ill. 131.

<sup>1</sup> See *Baltimore and Ohio R. R. Co. v. Brydon*, 3 Atl. Rep. 306 (Md.); *Lynn v. Baltimore & Ohio R. R. Co.*, 60 Md. 404; *Mansfield Machine Works v. Village of Lowell*, 29 N. W. Rep. (Mich.) 105; *Cole v. Homer*, 53 Mich. 438.

<sup>2</sup> See *Haines v. Tucker*, 50 N. H. 307; *Avery v. Wilson*, 81 N. Y. 341, (37 Am. Rep. 508).

<sup>3</sup> *Cahan v. Platt*, 69 N. Y. 348 (25 Am. Rep. 203); *Kipp v. Meyer*, 5 Hun, 111; *Hubbard v. George*, 49 Ill. 275.

<sup>4</sup> *Oxendale v. Wetherell*, 9 Barn. & C. 386; *Bowes v. Shand*, L. R. 2 App. C. 455; *Reuter v. Sala*, L. R. 4 C. P. D. 239; *Marland v. Stanwood*, 101 Mass. 470.

On the other hand, if the buyer wrongfully rejects a part of the goods, the seller is held to be excused from any future deliveries under the contract.<sup>1</sup>

§ 117. **Acceptance final — Right of rejection barred by acceptance.**— When there has once been an acceptance by the buyer, his right of rejection is gone. He cannot change his mind, and insist on a return of the goods.<sup>2</sup> His acceptance precludes him from afterward claiming in his defense that the goods were inferior in quality or quantity, as agreed by the parties,<sup>3</sup> unless he can show that the transaction is tainted with fraud, or that it rests upon a warranty as to quality and quantity.<sup>4</sup>

But the buyer is not obliged to exercise his right of rejection before he receives the goods; and his failure to do so before delivery, in reply to the seller's expression of doubt that the goods will come up to the terms of the contract, will not prevent him from afterwards objecting to them.<sup>5</sup>

Where the exercise of the right of rejection is based upon the existence of a fact or circumstance, which is discoverable, if at all, on or before a receipt of the goods, the right of rejection must be exercised at the time of delivery. If the buyer receives the goods under these circumstances he waives his right of rejection; as, for example, where the delivery is tendered after the expiration of the agreed time of delivery.<sup>6</sup>

<sup>1</sup> *Hughes v. United States*, 4 Ct. of Cl. 64.

<sup>2</sup> See *Carondelet Iron Works v. Moore*, 78 Ill. 65, 69.

<sup>3</sup> *McCormick v. Sarson*, 45 N. Y. 265; *Gilson v. Bingham*, 43 Vt. 410; *Thompson v. Libby*, 29 N. W. Rep. (Minn.) 150; *Haase v. Nonnemacher*, 21 Minn. 486; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515; *Locke v. Williamson*, 40 Wis. 377; *Olson v. Mayer*, 56 Wis. 551.

<sup>4</sup> See the chapters on Fraud and Warranty.

<sup>5</sup> *Dowell v. Williams*, 83 Kan. 319.

<sup>6</sup> *Baker v. Henderson*, 24 Wis. 509; *Bock v. Healy*, 8 Daly, 156; *Adams v. Helen*, 55 Mo. 468.

## CHAPTER X.

### VENDOR'S LIEN.

**SECTION 119.** Definition and general explanation.

120. How waived — Sale on credit — Receipt of security.

121. Lien how lost — Tender of price — Delivery of goods.

122. What delivery sufficient to destroy lien.

123. Statutory liens.

§ 119. Definition and general explanation. — A lien may be defined as “a right of retaining property until a debt due to the person retaining it has been satisfied.”<sup>1</sup> And the general rule is that, unless it is waived, the vendor of personal property has a lien on the goods while in his possession for the price.<sup>2</sup> But in order that the vendor of goods may claim a lien on the goods, they must have already become the property of the vendee; for one cannot have a lien on goods belonging to himself. Hence, as long as the title has not been transferred, as where the sale is of goods not specific, and they have not yet been selected and prepared for delivery;<sup>3</sup> or where the sale is of specific

<sup>1</sup> Benjamin on Sales, § 796. See, also, *Hammonds v. Barclay*, 2 East, 235.

<sup>2</sup> *Miles v. Gorton*, 2 C. & M. 504; *Clark v. Draper*, 19 N. H. 419; *Parks v. Hall*, 2 Pick. 211; *Arnold v. Delano*, 4 Cush. 83 (50 Am. Dec. 754); *Nevins v. Schofield*, 2 Pugs. & Bur. (N. B.) 435; *Bowen v. Burk*, 13 Pa. St. 146; *Safford v. McDonough*, 120 Mass. 291; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447; *Carlisle v. Kinney*, 66 Barb. 363; *Cornwall v. Haight*, 8 Barb. 328; *Bradley v. Michael*, 1 Ind. 551. See, also, *Barrett v. Pritchard*, 2 Pick. 512; *Haskins v. Warren*, 115 Mass. 514, 533; *White v. Welsh*, 38 Pa. St. 396, 420; *Griffiths v. Perry*, 1 El. & E. 680; *Dodsley v. Varley*, 12 Ad. & E. 632, 634; *Milliken v. Warren*, 57 Me. 46, 50. And see *Beam v. Blanton*, 3 Ired. Eq. 59, 62.

<sup>3</sup> See *ante*, § 88.

goods, but conditional, the vendor cannot be said to have a lien on the goods sold.<sup>1</sup> The only cases in which the vendor can have a lien on the goods, are those in which the title to the goods passes to the vendee without delivery of the possession.<sup>2</sup> The lien is not permitted to secure the payment of any thing more than the price. If the vendor has any other claim against the vendee, arising out of the same transaction, as for storage during the time that the goods are detained by the vendor in the exercise of the lien, the lien will not cover it.<sup>3</sup>

§ 120. **How waived — sale on credit — receipt of security.** — The vendor's lien may of course be waived by express agreement. Any agreement which is inconsistent with the retention of the lien operates as a waiver of it.<sup>4</sup> But it may also be waived by implication. For example, the lien is waived, when the goods are sold on credit by open agreement,<sup>5</sup> or by taking a time note in payment of the price.<sup>6</sup> In such cases, the vendee can insist upon a delivery of the goods to him before payment of the price.<sup>7</sup>

<sup>1</sup> See *ante*, § 87.

<sup>2</sup> See *ante*, §§ 84, 85.

<sup>3</sup> *Somes v. British Empire Shipping Co.*, 1 E. B. & E. 353; 27 L. J. Q. B. 397; Ex. Ch., E. B. & E. 367; 28 L. J. Q. B. 220; 8 H. L. C. 338; 30 L. J. Q. B. 221; *Crommelin v. N. Y. & Harlem R. R. Co.*, 4 Keyes, 90.

<sup>4</sup> *Pickett v. Bullock*, 52 N. H. 354.

<sup>5</sup> *Spartall v. Benecke*, 10 C. B. 212; 19 L. J. C. P. 298; *Ford v. Yates*, 2 M. & G. 549; *Lockett v. Nicklin*, 2 Ex. 3; *Greaves v. Ashlin*, 3 Camp. 426; *Chase v. Westmore*, 5 M. & S. 180; *Crawshay v. Homfray*, 4 B. & Ald. 50; *Cowell v. Simpson*, 16 Ves. Jr. 275; *Arnold v. Delano*, 4 Cush. 33; *Leonard v. Davis*, 1 Black. 476; *McNail v. Ziegler*, 68 Ill. 224; *Thompson v. Wedge*, 50 Wis. 642.

<sup>6</sup> *Arnold v. Delano*, 4 Cush. 41; *Milliken v. Warren*, 57 Me. 46; *Clark v. Drapen*, 19 N. H. 419; *Creanor v. Creanor*, 36 Ark. 91; *Jeckell v. Fried*, 18 La. An. 192; *Chapman v. Searle*, 3 Pick. 38, 45 (receipted bill of parcels); *Johnson v. Dickinson*, 78 N. Y. 42. The same rule applies also where the price is settled for by the transfer of a third person's note. *Benedict v. Field*, 16 N. Y. 595;

<sup>7</sup> See cases cited in preceding notes.

But if the vendor should retain possession until the time of payment had arrived, the right to a lien would revive, and the vendor could insist upon payment before delivery of the goods where there is a simple agreement for credit.<sup>1</sup> This is likewise the case, where the price is settled for by the execution of a promissory note or bill of exchange for the amount as long as the note or bill has not been negotiated.<sup>2</sup> The lien is also waived by implication, when the vendor receives some other security for the payment of the price.<sup>3</sup> But the waiver of the lien, on account of the agreement for credit or for collateral security, is only a disputable presumption of law, which may be rebutted by evidence of an intention of the parties to retain the lien and withhold possession from the vendee until payment has been made. And parol evidence is admissible for the purpose of proving this contrary intention.<sup>4</sup>

<sup>1</sup> *Owens v. Weedman*, 82 Ill. 409; *Milliken v. Warren*, 57 Me. 46; *Re Batchelder*, 2 Low. 245; *Grice v. Richardson*, L. R. 3 App. Cas. 819; *Thompson v. Baltimore, &c., R. R. Co.*, 28 Md. 396; *White v. Welsh*, 38 Pa. St. 396, 420; *Hunter v. Talbot*, 3 Smed. & M. 754; *Parker v. Byrnes*, 1 Low. 539; *New v. Swain*, 1 Dans. & L. 123; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Parks v. Hall*, 2 Pick. 206, 211; *Southwest Freight Co. v. Stanard*, 44 Mo. 71, 84.

<sup>2</sup> *Arnold v. Delano*, 4 Cush. 41; *Clark v. Draper*, 19 N. H. 419; *Milliken v. Warren*, 57 Me. 46; *Creanor v. Creanor*, 36 Ark. 91; *Johnson v. Dickinson*, 78 N. Y. 72; *Jeckell v. Fried*, 18 La. An. 192; *Gunn v. Bolckow*, L. R. 10 Ch. App. 491, 501; *Dixon v. Yates*, 5 Barn. & Adol. 313, 341; *Horncastle v. Farran*, 3 Barn. & Ald. 497; *Hewison v. Guthrie*, 2 Bing. N. C. 755.

<sup>3</sup> *Benedict v. Field*, 16 N. Y. 595 (note of third person); *Chambers v. Davidson*, L. R. 1 P. C. 296; 4 Moo. P. C. C. N. S. 158: "Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made."

<sup>4</sup> *Field v. Lelean*, 6 H. & N. 617; 30 L. J. Ex. 168; 1 Smith Lead Cas. 594, notes to *Wigglesworth v. Dallison*.



§ 121. Lien how lost — Tender of price — Delivery of goods.— The object of the vendor's lien is simply to secure the payment of the price; and if the vendee is willing to pay the price in full, the vendor cannot refuse payment and still hold on to the lien for some other purpose. While a mere tender of payment does not liquidate the indebtedness, it does destroy all rights to liens and securities, which were given or exist for the purpose of securing payment. A tender of payment of the price, therefore, releases the goods from the lien.<sup>1</sup> While in equity, in support of equitable claims, a lien may exist, independent of possession of the goods, at common law the lien is inseparable from the possession of the goods, and any actual transfer of possession in the performance of the contract of sale will operate to destroy the lien of the vendor, since the vendor's lien for the price is a common law, and not an equitable lien.<sup>2</sup> But the parties to the contract may, by express agreement, provide for the retention of the lien on the goods, notwithstanding there has been a delivery.<sup>3</sup> And it seems that parol evidence is admissible to establish this agreement.<sup>4</sup> But since the common law lien is inseparable from the possession of the goods by the vendor, the lien that exists and attaches to the goods, in favor of the

<sup>1</sup> *Martindale v. Smith*, 1 Q. B. 389. See *Dempsey v. Carson*, 11 Up. Can. Q. B. 462.

<sup>2</sup> *Haskins v. Warren*, 115 Mass. 515; *Freeman v. Nichols*, 116 Mass. 309; *Blackshear v. Burke*, 74 Ala. 239; *Thompson v. Wedge*, 50 Wis. 642; *McNall v. Ziegler*, 68 Ill. 224; *Obermier v. Core*, 25 Ark. 562; *Johnson v. Farnum*, 56 Ga. 144; *Gay v. Hardeman*, 31 Tex. 245; *Parks v. Hall*, 2 Pick. 306, 212; *Jenkins v. Eichelberger*, 4 Watts, 121; *James v. Bird's Adm'r*, 8 Leigh, 510; *Lupin v. Marie*, 6 Wend. 77; *Welsh v. Bell*, 82 Pa. St. 12, 17; *Boyd v. Moseley*, 2 Swan, 661; *Barnett v. Mason*, 7 Ark. 253.

<sup>3</sup> *Gregory v. Morris*, 96 U. S. 619; *Bunn v. Valley Lumber Co.*, 51 Wis. 376; *Sawyer v. Fisher*, 32 Me. 28; *Dunning v. Stearns*, 9 Barb. 630; *Bradeen v. Brooks*, 22 Me. 453, 471.

<sup>4</sup> See *Gay v. Hardeman*, 31 Texas, 245, 250; *Burnham v. Marshall*, 56 Vt. 365.

vendor, after the vendee has taken possession of the goods, must be either an equitable, or statutory, lien. In the absence of a statutory provision, this lien could not be enforced against any subsequent purchaser from the buyer. But in many of the States, the statutes do provide for the enforcement of such a lien against subsequent purchasers, whenever the lien is created or evidenced by an instrument in writing and recorded like mortgages and deeds of conveyance.<sup>1</sup>

§ 122. **What delivery sufficient to destroy lien.**— But in order that the delivery of possession may be sufficient to destroy the vendor's lien for the price, it must be made in pursuance, and in execution, of the contract of sale. If the possession has been given to the buyer for some other purpose than to execute the contract of sale, as where the seller agrees that the buyer is to have possession as bailee, pending the further performance of the contract, the vendor's lien still exists, for the vendor has not parted with the possession of an absolute owner.<sup>2</sup>

So, also, there is no loss of the lien, if the vendor has not yet actually parted with the possession, although they have been boxed and mailed with the buyer's name, or otherwise prepared for delivery to him.<sup>3</sup>

But if every thing is done which is necessary to place the goods under the control of the buyer, the most informal or constructive delivery is sufficient to destroy the lien.

<sup>1</sup> See *Bughee v. Stevens*, 33 Vt. 389; *Barker v. Richardson*, 57 Vt. 308; *Bunn v. Valley Lumber Co.*, 51 Wis. 576; *Loeb v. Blum*, 25 La. An. 232; *Naylor v. Young*, 7 Lea. 735; *McClenney v. McClenney*, 3 Tex. 192, 197.

<sup>2</sup> *Tempest v. Fitzgerald*, 3 B. & A. 680; *Marvin v. Wallace*, 6 E. & B. 726; 25 L. J. Q. B. 369; *Reeves v. Capper*, 5 Bing. N. C. 136.

<sup>3</sup> *Goodall v. Skelton*, 2 H. Bl. 316; *Simmons v. Swift*, 5 B. & C. 357; *Proctor v. Jones*, 2 C. & P. 532; *Dixon v. Yates*, 5 B. & Ad. 313; *Townley v. Crump*, 4 A. & E. 58; *Boulter v. Arnott*, 1 C. & M. 333; *Arnold v. Delano*, 4 Cush. 33; *Thompson v. Baltimore, &c., R. R. Co.*, 28 Md. 396.

Thus, the exercise by the buyer of the general authority of an owner over the goods, when they are lying at a public wharf or warehouse, is sufficient proof of a delivery to destroy the lien.<sup>1</sup>

The delivery may also be constructive, as when the goods are delivered to a common carrier for transportation to the buyer. The delivery to the common carrier destroys the vendor's lien, although the right of stoppage *in transitu* survives,<sup>2</sup> unless a bill of lading is issued by the common carrier in which the vendor appears as the consignee. In such a case, there is no constructive delivery to the buyer and hence the lien of the vendor is not affected by the delivery of the goods to the common carrier.

Where, however, the vendor has taken out a bill of lading in his own name; he may thereafter make a delivery of the goods to the vendee, sufficient to destroy the vendor's lien, by transferring by indorsement the bill of lading.<sup>3</sup>

Whether the transfer of other documents of title, such as delivery orders, warehouse and elevator receipts, will constitute a sufficient delivery of the goods themselves, — where they are in the hands of a bailee — in order to destroy the vendor's lien, depends in the main upon the presence or absence of statutory regulations. Generally, it is not a suffi-

<sup>1</sup> *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722; 34 L. J. Ex. 161.

<sup>2</sup> *Boyd v. Moseley*, 2 Swan, 661; *Dawes v. Peck*, 8 T. R. 380; *Warte v. Baker*, 2 Ex. 1; *Frajano v. Long*, 4 B. & C. 219; *Johnson v. Dodgson*, 2 M. & W. 658; *Meredith v. Meighs*, 2 E. & B. 364; 22 L. J. Q. B. 401; *Hart v. Bush*, E. B. & E. 494; 27 L. J. Q. B. 271; *Smith v. Hudson*, 6 B. & S. 481; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Norman v. Phillips*, 14 M. & W. 277; *Dunlop v. Lambert*, 2 M. & W. 653. See *ante*, § 95.

<sup>3</sup> The transfer of the bill of lading under such circumstances terminates the right of stoppage *in transitu* as well. *Newhall v. Cen. Pac. R. & Co.*, 51 Cal. 345; *Lee v. Kimball*, 45 Me. 172; *Clementson v. Grand Trunk Ry. Co.*, 42 Up. Can. Q. B. 273; *Leash v. Scott*, 2 Q. B. Div. 376. See *post*, § 134, for a fuller discussion of this question in relation to the right of stoppage *in transitu*.

cient delivery, where the statutes of the State have not given to these orders and receipts the negotiable character of bills of lading.<sup>1</sup> But in many of the States, these documents are held to operate as symbols of the property itself, either at common law or by statute, and the transfer of them will be sufficient to destroy the vendor's lien.<sup>2</sup>

Although under peculiar circumstances, a delivery of a part of the goods may so far operate as a symbolical delivery of the whole, so as to relieve all of the goods from the burden of the lien, as where the partial delivery is accompanied by an agreement, which establishes an intention that the bailee of the goods should attorn to the buyer<sup>3</sup> yet the general rule is that a partial delivery only destroys the lien so far as it applies to the part delivered, the lien still resting on the part of the goods which remains in the possession of the vendor. And this is the unvarying rule, where the goods are in the possession of the vendor, instead of a bailee.<sup>4</sup>

§ 123. **Statutory liens.** — In most of the States, if not in all, it is provided that the seller of goods shall hold a lien

<sup>1</sup> See *Keeler v. Goodwin*, 111 Mass. 490; *Re Batchelder*, 2 Low. 245; *Southwestern Freight, &c., Co., v. Stanard*, 44 Mo. 71, 81.

<sup>2</sup> *Davis v. Russell*, 52 Cal. 611; *Horr v. Baker*, 8 Cal. 613; *Burton v. Curyea*, 40 Ill. 320; *Cochran v. Ripy*, 13 Bush, 495; *Whitlock v. Hay*, 58 N. Y. 484; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 424; *Allen v. Maury*, 66 Ala. 10; *Merchants' Bank v. Hibbard*, 48 Mich. 118.

<sup>3</sup> *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Tausley v. Turner*, 2 Bing. N. C. 151.

<sup>4</sup> *Dixon v. Yates*, 5 B. & Ad. 318; *Betts v. Gibbons*, 2 A. & E. 73; *Bunney v. Coyntz*, 4 B. & Ad. 668; *Simmons v. Swift*, 5 B. & C. 857; *Miles v. Gorton*, 2 Cr. & M. 504; *Grice v. Richardson*, 3 App. Cas. 319; *Tanner v. Scovill*, 14 M. & W. 28; *Jones v. Jones*, 8 M. & W. 431; *Whitehead v. Anderson*, 9 M. & W. 518; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Bolton v. Lancashire, &c., R. R. Co.*, L. R. 1 C. P. 481; 35 L. J. C. P. 137; *Payne v. Shedbolt*, 1 Camp. 427; *Moeller v. Young*, 5 E. & B. 7; 24 L. J. Q. B. 317; 25 L. J. Q. B. 94. The seller's lien attaches to the part undelivered for the whole price, and not simply for the part not delivered. *Buckley v. Furniss*, 17 Wend. 504.

for the price over them, after delivery of possession to the vendee. This is particularly the case with the lien for materials furnished in the construction of buildings and ships, and in the fitting of the latter for a voyage. In respect to the latter, a lien is given by the laws of admiralty. But these classes of liens are not customarily treated in connection with the general law of sales of personal property, and I will content myself with merely referring to their existence, and directing the reader to works on admiralty and liens, and to the statutes of the different States for a full discussion of them.

## CHAPTER XI.

### STOPPAGE IN TRANSITU.

- SECTION 125.** General statement and definition.
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  - 127. The conditions of exercise of the right.
  - 128. The goods must be unpaid for — Effect of partial payment.
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  - 134. Effect of resale of goods on right of stoppage in transitu.
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  - 136. Mode of exercising the right.
  - 137. Effect of stoppage of goods on rights of carrier.

§ 125. General statement and definition. — Stoppage *in transitu* is the right to regain possession of goods, which have been forwarded to the buyer on credit, and then to hold the possession until the price is paid.<sup>1</sup> It is sometimes said that the exercise of the right is nothing more than the resumption of the vendor's lien; and this is certainly true, so far that there is no rescission of the contract of sale.<sup>2</sup> Therefore, the vendee or his duly authorized assignee is afterwards entitled to the possession of the goods, on payment of the price, although the goods may

<sup>1</sup> See *Atkins v. Colby*, 20 N. H. 154, 155; *Inslee v. Lane*, 57 N. H. 454, 457; *Hause v. Judson*, 4 Dana, 7; *O'Brien v. Norris*, 16 Md. 122, 130; *Loeb v. Peters*, 62 Ala. 243 (35 Am. Rep. 17).

<sup>2</sup> *Rowley v. Bigelow*, 12 Pick. 312; *Jordan v. James*, 5 Ohio, 88; *Kemp v. Falk*, 7 App. Cas. 578, 581; *Patten's Appeal*, 45 Pa. St. 151.

have risen greatly in value.<sup>1</sup> But the lien which arises, or which is enforced, in consequence of the exercise of the right of stoppage *in transitu*, is not exactly the vendor's lien which he has and can enforce before delivery to the carrier, whether the vendor is insolvent or not. For the right of stoppage *in transitu* is not at all affected by the fact that the goods have been sold on a credit, the time for payment of which has not yet expired. The right may be exercised, notwithstanding the price is not yet due.<sup>2</sup> Nor does the acceptance of time notes or bills, in settlement of the price, interfere with the exercise of the right if it does not amount to an absolute payment.<sup>3</sup> The stoppage *in transitu* is therefore to be distinguished from mutual agreements to rescind the contract of sale, and to restore the goods to the possession of the vendor, and to re-vest the title in him.<sup>4</sup>

The stoppage *in transitu* is also not to be confounded with the right of a debtor to countermand the delivery of goods, which he had shipped to the creditor in payment or satisfaction of the debt, as long as the creditor does not know of, and assent to, the transaction. This has been

<sup>1</sup> *Newhall v. Vargas*, 18 Me. 93; *Rucker v. Donovan*, 18 Kan. 251; *Rogers v. Thomas*, 20 Conn. 53; *Stanton v. Eagar*, 10 Pick. 475; *Rowley v. Bigelow*, 12 Pick. 313; *Grout v. Hill*, 4 Gray, 361; *Wart v. Scott*, 6 Grant (Ont.) 154; *Patten's Appeal*, 45 Pa. St. 151; *Babcock v. Bonnell*, 80 N. Y. 244; *Chandler v. Fuller*, 10 Tex. 2; *McElroy v. Seerey*, 61 Md. 389 (48 Am. Rep. 110).

<sup>2</sup> *Clapp v. Peck*, 55 Iowa, 270; *Clapp v. Sohmer*, 55 Iowa, 273; *Stubbs v. Lund*, 7 Mass. 453, 456; *Babcock v. Bonnell*, 80 N. Y. 244, 249; *Bell v. Moss*, 5 Whart. 189; *Atkins v. Colby*, 20 N. H. 154; *Newhall v. Vargas*, 18 Me. 193.

<sup>3</sup> *Eaton v. Cook*, 32 Vt. 58; *Stubbs v. Lund*, 7 Mass. 453; *Clapp v. Sohmer*, 55 Iowa, 273; *Hays v. Mouille*, 14 Pa. St. 48, 54; *Bell v. Moss*, 5 Whart. 189, 200; *Newhall v. Vargas*, 18 Me. 93; *Lewis v. Mason*, 36 Up. Can. Q. B. 590, 605-608.

<sup>4</sup> *Scholfield v. Bell*, 14 Mass. 40; *Groat v. Hill*, 4 Gray, 361; *Kahnweiler v. Buck*, 2 Pearson, 69; *Cox v. Burns*, 1 Iowa, 64; *Ash v. Putnam*, 1 Hill, 302; *Sturtevant v. Orser*, 24 N. Y. 538; *Mason v. Wilson*, 43 Ark. 172.

called a stoppage *in transitu*,<sup>1</sup> but it is an altogether different transaction.<sup>2</sup>

§ 126. Who may exercise the right. — It was once supposed that the right could only be exercised by those who were strictly called vendors of the goods. But it is now very generally held that any one who stands in the relation of vendor to the goods may exercise the right, whether he be a factor or commission merchant, who buys for the consignee,<sup>3</sup> or he pays the price for the vendee, and takes the bill of lading in his own name, or has it assigned to him.<sup>4</sup> It can also be exercised by the vendor of an executory interest in the goods.<sup>5</sup> But it cannot be claimed by one having a lien on the goods for labor.<sup>6</sup> It has been held in Arkansas, that if A. orders goods of B., and B. sends the order to C., with directions to ship the goods to A., on B's credit, C. cannot exercise the right of stoppage *in transitu*, on the insolvency of B., on the ground that there is no privity of contract between C. and A., and C is not the vendor of A.<sup>7</sup>

But if one has the power to exercise the right of stoppage *in transitu*, he is not obliged to exercise it personally. His duly authorized agent may exercise it for him.<sup>8</sup> But a

<sup>1</sup> *Walter v. Ross*, 2 Wash. C. C. 283.

<sup>2</sup> *Berly v. Taylor*, 5 Hill. 581; *Wood v. Boach*, 1 Yeates, 177; *Clark v. Mauran*, 3 Paige, 373.

<sup>3</sup> *Newhall v. Vargas*, 13 Me. 98; *Seymour v. Newton*, 105 Mass. 275; *Ex parte Miles*, 15 Q. B. Div. 39; *Ilseley v. Stubbs*, 9 Mass. 65, 71.

<sup>4</sup> *Gossler v. Schepeler*, 5 Daly, 476; *Muller v. Ponder*, 55 N. Y. 325. In England, the buyer's surety may stop the goods *in transitu*. *Siffken v. Wray*, 6 East. 371, 380; *Imperial Bank v. London, &c., Dock Co.*, L. R. 5 Ch. D. 195, 202.

<sup>5</sup> *Jenkyns v. Osborne*, 7 Man. & G. 678, 698.

<sup>6</sup> *Sweet v. Pym*, 1 East, 4, 5.

<sup>7</sup> *Memphis, &c., R. R. Co. v. Freed*, 38 Ark. 614. See *Gwyn v. Richmond, &c., R. R. Co.*, 85 N. C. 429.

<sup>8</sup> *Reynolds v. Boston, &c., R. R. Co.*, 43 N. H. 580, 589; *Bell v. Moss*, 5 Whart, 206. But see *Summeril v. Elden*, 1 Binn. 106; *Gwyn v. Richmond, &c., R. R. Co.*, 85 N. C. 429 (39 Am. Rep. 708).



stoppage by an unauthorized agent is not good, unless it has been ratified by the vendor, before the vendee has obtained possession of the goods, or made any demand for it.<sup>1</sup> But it has been held to be a sufficient ratification, if made before the termination of the transit, although the agent does not receive notice of the ratification until after a demand for the goods has been made by the vendee.<sup>2</sup>

§ 127. **The conditions of exercise of the right.** — In order that the vendor may exercise the right of stoppage *in transitu*, the following conditions must exist: the goods must be unpaid for; they must be in transit; they must be in the possession of a third person; and the buyer must be insolvent.<sup>3</sup>

§ 128. **The goods must be unpaid for — Effect of partial payment.** — Absolute payment necessarily prevents the exercise of the right, since its exercise is solely for the purpose of enforcing payment. But the mere taking of time notes or bills in satisfaction of the price does not affect the right, unless by the agreement of the parties this is done in absolute payment of the price.<sup>4</sup>

Part-payment also has no effect on the right to stop the goods in protection of the part of the price which remains unpaid.<sup>5</sup>

<sup>1</sup> Durgy Cement, &c., Co. v. O'Brien, 123 Mass. 14; distinguishing Bird v. Brown, 4 Exch. 786; Davis v. McWhirter, 40 Up. Can. Q. B. 598.

<sup>2</sup> Hutchings v. Nunes, 1 Moo. P. C. N. S. 243.

<sup>3</sup> More v. Lott, 13 Nev. 376, 379; Cooper v. Bill, 3 Hurl. & C. 722, 727; Walsh v. Blakely, 9 Pac. Rep. (Mont.) 809; Wood v. Roach, 2 Dall. 180; Chandler v. Fulton, 10 Tex. 2; St. Joze Indiana, 1 Wheat, 208, 212.

<sup>4</sup> Stubbs v. Lund, 7 Mass. 453; Clapp v. Sohmer, 55 Iowa, 273; Hays v. Mouille, 14 Pa. St. 48; Lewis v. Mason, 36 Up. Can. Q. B. 590; Eaton v. Cook, 32 Vt. 58; Bell v. Moss, 5 Whart. 200; Newhall v. Vargas, 13 Me. 103. See *post*, § 144, as to what constitutes payment.

<sup>5</sup> Jordan v. James, 5 Ohio, 88; Newhall v. Vargas, 13 Me. 108; Hodgson v. Lay, 7 T. R. 440; Feise v. Wray, 3 East, 93; Edwards v. Brewer, 2 M.

§ 129. **When does the transit begin.**—The second condition is, that the goods must be in transit. Hence the right could not be exercised until the transit has begun. If the right of detention is exercised before the beginning of the transit, it must be in pursuance of some other right, than that of stoppage *in transitu*.<sup>1</sup> That delivery of the goods to a carrier which is sufficient to destroy the vendor's lien<sup>2</sup> is sufficient proof of the fact that the transit has begun. For the goods are in transit, in contemplation of law, as soon as they come into the possession of the common carrier for the purpose of being transported to their place of destination, even though they are not yet loaded for transportation, but are still in the carrier's warehouse awaiting transportation.<sup>3</sup>

§ 130. **When does the transit end?**—As a general proposition, it may be said that the transit, and therewith the right of stoppage *in transitu*, ends, when the carrier divests himself of possession of the goods in such capacity, by an actual or constructive delivery of the goods to the vendee or his agent.<sup>4</sup> The delivery need not be at the vendee's

& W. 375; *Van Casteel v. Booker*, 2 Ex. 702; *Alkins v. Colby*, 20 N. H. 154; *Haven v. Place*, 28 Minn. 551, 553.

<sup>1</sup> See *Thompson v. Baltimore, &c.*, R. R. Co., 28 Md. 396. See also *ante*, § 122.

<sup>2</sup> See *ante*, § 95.

<sup>3</sup> *Bendston v. Strang*, L. R. 4 Eq. 481; *Stokes v. La Riviere*, reported in *Bohling v. Inglis*, 3 East, 307; *Northey v. Field*, 2 Esp. 613; *Hodgson v. Loy*, 7 T. R. 440; *Holst v. Pownall*, 1 Esp. 40; *Ex parte Reavear, &c.*, Co., L. R. 11 Ch. D. 560.

<sup>4</sup> *Half v. Allyn*, 60 Tex. 278, 279; *Chandler v. Fulton*, 10 Tex. 13; *Wenger v. Bernhardt*, 55 Pa. St. 300; *Wind Engine, &c., Co. v. Oliver*, 16 Neb. 612, 614; *Chicago, &c., R. R. Co. v. Painter*, 15 Neb. 394, 396; *Ex parte Watson*, L. R. 5 Ch. D. 85; *Covell v. Hitchcock*, 23 Wend. 611; *Buckley v. Furniss*, 15 Wend. 137; *Boyd v. Moseley*, 2 Swan, 661; *Walsh v. Blakely*, 9 Pac. Rep. (Mont.) 809, 812; *Symns v. Schotten*, 10 Pac. Rep. (Kans.) 728; *Hays v. Mouille*, 14 Pa. St. 53. See *Atkins v. Colby*, 20 N. H. 154; *Sawyer v. Joslin*, 20 Vt. 172, 179; *Conyers v. Ennis*, 2 Mason,

warehouse; for it would be sufficient, if it were made to the vendee's agent at the wharf or depot of the common carrier.<sup>1</sup> But the mere arrival of the goods at the place of destination does not terminate the transit, as long as the carrier still has the possession of the goods as carrier.<sup>2</sup> And where the carrier still has possession, he is presumed to hold the possession in the capacity of a carrier.<sup>3</sup> He is also held to retain the possession as carrier, even though the goods have been removed from the cars or ship, and have been stored in the carrier's warehouse, as long as the freight and other charges remain unpaid. The carrier is presumed to remain in possession of the goods, as carrier, until all the claims for transportation have been discharged.<sup>4</sup> But if the carrier's charges have all been paid by the vendee or his agent, the subsequent retention of possession by the carrier is then presumed to be in the capacity of a warehouseman or bailee for the vendee, and hence the transit is at an end.<sup>5</sup>

236; *Mohr v. Boston, &c., R. R. Co.*, 106 Mass. 67, 70; *Hall v. Dimond*, 8 Atl. Rep. (N. H.) 423.

<sup>1</sup> *Scott v. Pettit*, 8 Bos. & P. 469, 472; *Rowe v. Pickford*, 8 Taunt. 83, 85; *Merch. Bank Co. v. Phoenix, &c., Co.* L. R. 5 Ch. D. 219.

<sup>2</sup> *Seymour v. Newton*, 105 Mass. 275; *Greve v. Dunham*, 60 Iowa, 108; *McFetridge v. Piper*, 40 Iowa, 627; *Inslee v. Lane*, 57 N. H. 454; *Parker v. McIver*, 1 Des. Eq. 281; *Naylor v. Dennie*, 8 Pick. 198; *Mottram v. Heyer*, 5 Denio, 629.

<sup>3</sup> See *Kemp v. Falk*, L. R. 7 App. Cas. 573, 584; *Hall v. Dimond*, 8 Atl. Rep. (N. H.) 433; *Ex parte Burrow*, L. R. 6 Ch. Div. 783, 738; *Ex parte Cooper*, L. R. 11 Ch. D. 68, 74, 76, 78; *Whitehead v. Anderson*, 9 M. & W. 518, 535; *Allen v. Griffin*, 2 Cromp. & J. 218; *Macon West. R. R. Co. v. Meador*, 65 Ga. 725; *More v. Lott*, 13 Nev. 376; *McLean v. Breithaupt*, 12 Ont. App. 383; *Syms v. Schotten*, 35 Kans. 310; *Guilford v. Smith*, 30 Vt. 49, 72.

<sup>4</sup> *Callahan v. Babcock*, 21 Ohio St. 281; *Syms v. Schotten*, 35 Kans. 310; *O'Neill v. Garrett*, 6 Iowa, 480; *More v. Lott*, 13 Nev. 384; *Clapp v. Peck*, 55 Iowa, 270; *Hoover v. Tibbetts*, 13 Wis. 79; *Morris v. Shryock*, 50 Miss. 591; *Half v. Allyn*, 60 Tex. 278; *Chandler v. Fulton*, 10 Tex. 1; *Bender v. Bowman*, 2 Pearson, 517; *McLean v. Breithaupt*, 12 Ont. App. 383; *Sawyer v. Joslin*, 20 Vt. 172 (49 Am. Dec. 768.)

<sup>5</sup> *McFetridge v. Piper*, 40 Iowa, 627; *Hall v. Dimond*, 63 N. H. 565; *Lane v. Robinson*, 18 B. Mon. 623.

But the mere tender of the charges for freight by the vendee does not terminate the transit, if it is not accepted; although the tender was in every respect legal, and the carrier's refusal to deliver to the vendee was not based on any sufficient grounds.<sup>1</sup>

For the same reasons, the deposit of goods by the carrier, at the place of destination, in the custom house, does not in itself terminate the transit, and therewith the right of stoppage *in transitu*. The right of stoppage *in transitu* continues until the goods have been duly entered by the consignee, and the custom house charges paid.<sup>2</sup> The delivery need not necessarily be made to the vendee, nor even to his agent. If the right to the goods has been assigned by the consignee, then delivery to the assignee will terminate the transit as well as would delivery to the consignee, in the absence of an assignment.<sup>3</sup> But the delivery must be made to the vendee or his duly authorized agent or assignee, in order to put an end to the right of stoppage *in transitu*. If the goods are seized by an officer, under a writ of attachment or execution, and taken from the carrier, the right of stoppage *in transitu* remains unaffected by the seizure, and may still be exercised.<sup>4</sup> It is a self evident proposition that

<sup>1</sup> *Allen v. Mercier*, 1 Ashm. 108.

<sup>2</sup> *Cartwright v. Wilmerding*, 24 N. Y. 521; *Fraschieris v. Henriques*, 6 Abb. Fr. (N. S.) 251; *Wiley v. Smith*, 1 Ont. App. 179; *Wilds v. Smith*, 2 Ont. App. 8; *Parker v. Byrnes*, 1 Low. 539; *Donath v. Broomhead*, 7 Pa. St. 301; *Burnham v. Winsor*, 5 Law Rep. 507; *Holbrook v. Vose*, 6 Bosw. 78; *Lewis v. Mason*, 36 Up. Can. Q. B. 590; *In re Bearns*, 18 Bank Reg. 500; *Mottram v. Heyer*, 5 Denio, 629. See *Mohr v. Boston, &c.*, R. R. Co., 106 Mass. 67, 71.

<sup>3</sup> *Stevens v. Wheeler*, 27 Barb. 658, 661; *Holbrook v. Vose*, 6 Bosw. 77; *U. S. Wind Engine Co. v. Oliver*, 16 Neb. 612.

<sup>4</sup> *Sherman v. Rugee*, 55 Wis. 346, 349; *Kitchen v. Spear*, 30 Vt. 545; *Naylor v. Dennie*, 8 Pick. 198; *Seymour v. Newton*, 105 Mass. 275; *Durgy Cement, &c., Co. v. O'Brien*, 123 Mass. 14; *Clark v. Lynch*, 4 Daly, 88; *Blackman v. Pierce*, 23 Cal. 508; *Rucker v. Donovan*, 13 Kan. 251; *Mississippi Mills v. Bank*, 9 Lea, 314; *Wood v. Yeatman*, 15 B. Mon. 270; *Covell v. Hitchcock*, 23 Wend. 611; *Buckley v. Furniss*, 15 Wend. 187; 17 Wend. 504; *Cox v. Burns*, 1 Iowa, 64.

a delivery of part of the goods to the consignee is not a bar to the exercise of the right of stoppage *in transitu* in respect to the goods not yet delivered, unless by agreement of the parties the delivery of a part of the goods is taken as a constructive delivery of the whole.<sup>1</sup>

§ 131. Delivery at an intermediate port. — But, in order to terminate the right of stoppage *in transitu*, the vendee need not take possession at the original place of destination. If he actually acquires the possession, it will be sufficient, even though it is acquired at some point intermediate to the point of departure and the place of original destination. The vendee or his assignee may intercept the goods on their way and destroy the right of stoppage *in transitu*, by getting the goods into his possession.<sup>2</sup> And the rights of the vendor are lost by this interception of the goods at an intermediate point, although it is done by a vendee's agent under instructions to ship the goods to some other point than the original place of destination.<sup>3</sup> The right of stoppage is, however, not destroyed by the interception of the goods by the vendee's agents, when they take possession of the goods under instructions from the vendee to ship them to him at the original place of destination. The delivery at the intermediate point is required to be a *bona fide* delivery, in order to terminate the transit and destroy the vendor's right of stoppage. And delivery at the intermediate point, with the intention of having the goods reshipped to the original place of destination, is evidently done for the purpose of defeat-

<sup>1</sup> Kemp v. Falk, L. R. 7 App. Cas. 573; Ex parte Cooper, L. R. 11 Ch. D. 68; Buckley v. Furniss, 17 Wend. 504, 505.

<sup>2</sup> Secomb v. Nutt, 14 B. Mon. 324; Wood v. Yeatman, 15 B. Mon. 270; Stearns v. Wheeler, 27 Barb. 658; Mohr v. Boston, &c., R. R. Co., 106 Mass. 72; Poole v. Houston & Texas C. R. Co., 58 Tex. 134.

<sup>3</sup> Becker v. Hallgarten, 86 N. Y. 167; Kendal v. Marshall, 11 Q. B. D. 356; Ex parte Miles, 15 Q. B. D. 89.

ing the vendor's rights, and, therefore, not a *bona fide* delivery.<sup>1</sup>

§ 132. **Delivery to agent at place of destination with provision for further transportation.** — On the other hand, if the goods are brought to the place of destination designated in the contract of shipment, and there delivered to an agent of the vendee, it does not revive, or prevent the loss of, the right of stoppage *in transitu*, that the vendee's agent takes possession with the instructions to forward the goods to another place. The provision for further transportation does not make the delivery by the first carrier any less a termination of the transit.<sup>2</sup>

§ 133. **Delivery by vendor to ship chartered by vendee — Vendee acting as the carrier.** — Since delivery of the goods to some third person as carrier is essential to the exercise of the right of stoppage *in transitu*, and the right of stoppage is lost whenever the vendee acquires possession, if the vendee himself acts as carrier of the goods, either as owner and manager, or charterer, of the car or ship, and the goods are delivered to him for transportation, it has been held that there is ordinarily such a delivery to the vendee, as to put an end to, or prevent altogether the attachment of the right of stoppage *in transitu*.<sup>3</sup> But the

<sup>1</sup> *Harris v. Pratt*, 17 N. Y. 249; limited in 86 N. Y. 167; In re Foot, 11 Blatchf. 580; *Aguirre v. Parmelee*, 22 Conn. 473; *Pottinger v. Hecksher*, 2 Grant, 309; *McDonald v. McPherson*, 12 Duval (Can.) 416; *Markwald v. Creditors*, 7 Cal. 213; *Hays v. Monille*, 14 Pa. St. 48; *Holbrook v. Vose*, 6 Bosw. 76; *Cabeer v. Campwell*, 30 Pa. St. 254.

<sup>2</sup> *Guilford v. Smith*, 30 Vt. 49; *Biggs v. Barry*, 2 Curtis, 259; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442; *Pottinger v. Hecksher*, 2 Grant (Ont.) 309; *Sawyer v. Joslin*, 20 Vt. 172; *Harris v. Hart*, 6 Duer, 606, 625; *Hays v. Monille*, 14 Pa. St. 48; *Ex parte Gibbes*, L. R. 1 Ch. D. 101, 109; *Becker v. Hallgarten*, 86 N. Y. 167; *Gill v. Benjamin*, 64 Wis. 362 (54 Am. Rep. 619, 622); *Kendall v. Stevens*, L. R. 11 Q. B. D. 356; *Ex parte Miles*, L. R. 15 Q. B. D. 39.

<sup>3</sup> *Ogle v. Atkinson*, 5 Taunt. 759; *Turner v. Trustees Liverpool Docks*,

doctrine has been repudiated by the Massachusetts and the later English cases,<sup>1</sup> and the right of stoppage *in transitu* is held to exist still, notwithstanding the goods are put for transportation on board of the vendee's car or vessel. But it would in any event be held that if the consignor should take a bill of lading providing for the delivery of the goods to his order, the delivery of the goods to the vendee for transportation in his own car or vessel would be to him strictly in the capacity of a carrier, and he could not claim to receive them as vendee. The vendor could stop the goods *in transitu* under these circumstances.<sup>2</sup> But it would seem, however, that where the bill of lading is taken to the order of the consignor, there has been no delivery of the goods by the vendor at all, he has not parted with the title,<sup>3</sup> and hence the right of stoppage *in transitu* has not attached; but that the goods, by being stopped or ordered to be returned, are controlled by their owner, the person to whose order they are to be delivered on arrival at the place of destination.

§ 134. **Effect of resale of goods or right of stoppage in transitu.** — A mere sale of the goods by the consignee, without any agreement or understanding with the vendor, would have no effect on the right of stoppage *in transitu*, unless the subvendee acquires possession of the goods.<sup>4</sup>

6 Ex. 543; 20 L. J. Ex. 394; Van Casteel v. Booker, 2 Ex. 691; Bolin v. Huffnagel, 1 Rawle, 9, 18; Thompson v. Stewart, 7 Phila. 187; Cross v. O'Donnell, 44 N. Y. 661; Pequeno v. Taylor, 38 Barb. 375. See Newhall v. Vargas, 18 Me. 107; Parker v. McIver, 1 Des. Eq. 281; Rowley v. Bigelow, 12 Pick. 307.

<sup>1</sup> Stubbs v. Lund, 7 Mass. 453; Ilsley v. Stubbs, 9 Mass. 65; Brindley v. Cilwyn Slate Co., 55 L. J. Q. B. 67; Ex parte Rosevear China Clay Co., 11 Ch. Div. 560.

<sup>2</sup> Turner v. Trustees Liverpool Docks, 6 Ex. 543, 20 L. J. Ex. 394.

<sup>3</sup> See *ante*, § 95.

<sup>4</sup> Holbrook v. Vose, 6 Bosw. 77; U. S. Wind Engine Co. v. Oliver, 16 Neb. 612 (where possession had been acquired by subvendee); Treadwell v. Aydlette, 9 Heisk. 388 (with agreement of vendor); Rowley v.

But if a bill of lading has been issued, by a transfer of the bill of lading to the subvendee, he becomes the owner of the goods, and the vendor loses his right of stoppage, although the goods are still in transit.<sup>1</sup> A *bona fide* transfer of the bill of lading would destroy the right of stoppage, although made in payment of an antecedent debt,<sup>2</sup> but not, where the bill is assigned merely as collateral security.<sup>3</sup> Nor, where it is transferred to an assignee for the benefit of the vendee's creditors, as long as the assignee does not acquire possession before the exercise of the right of stoppage.<sup>4</sup> And it is also held that if the original sale was tainted by the fraud of the vendee, the right of stoppage *in transitu* may be exercised, notwithstanding the transfer of the bill of lading.<sup>5</sup>

§ 135. **Insolvency of the buyer.**— The last condition of the exercise of the right of stoppage *in transitu* is that the buyer has become insolvent, or that the vendor has learned of the buyer's insolvency since the goods have been shipped to the buyer. If the insolvency occurs and is known

Bigelow, 12 Pick. 307 (agreement of vendor); *Eaton v. Cook*, 82 Vt. 58; *Walt v. Scott*, 6 Grant. (Ont.) 154.

<sup>1</sup> *Newhall v. Cen. Pac. R. R.*, 51 Cal. 345; *Loeb v. Peters*, 63 Ala. 248; *Chandler v. Fulton*, 10 Tex. 2. See for effect of premature transfer of bill of lading, before it has come into possession of the vendee, *Patteson v. Coulton*, 33 Ind. 240; *Walter v. Ross*, 2 Wash. C. C. 283; *Stanton v. Eager*, 16 Pick. 476.

<sup>2</sup> *Lee v. Kimball*, 45 Me. 172; *Least v. Scott*, 2 Q. B. D. 376; *Clementson v. Grand Trunk Ry. Co.*, 42 Up. Can. Q. B. 273.

<sup>3</sup> *Loeb v. Porters*, 63 Ala. 243; *Lessasler v. Southwestern*, 2 Woods, 3.

<sup>4</sup> *Stanton v. Eager*, 16 Pick. 467; *Arnold v. Delano*, 4 Cush. 33; *Bell v. Moss*, 5 Whart. 205; *Buckley v. Furniss*, 17 Wend. 504; *Harriss v. Hart*, 6 Dur. 627.

<sup>5</sup> *Dows v. Perrin*, 16 N. Y. 325; *Decan v. Shipper*, 35 Pa. St. 239; *Brower v. Peabody*, 13 N. Y. 122; *Evansville, &c., R. R. Co. v. Erwin*, 85 Ind. 457. See *Barnard v. Campbell*, 55 N. Y. 456; *Pollard v. Vinton*, 105 U. S. 7. But see *Dows v. Greene*, 32 Barb. 490; 24 N. Y. 638; *Dows v. Rush*, 28 Barb. 157; *Blossom v. Champion*, 28 Barb. 217. See also *post*, §



by the seller before he ships the goods, he cannot exercise the right of stoppage. There must be a change of circumstances after shipment, in order to justify his stoppage of the goods.<sup>1</sup>

It is not necessary that there should be a technical case of insolvency; as that the buyer has failed to meet his bank obligations, has taken advantage of the bankrupt law or made an assignment for the benefit of creditors. It is sufficient to justify the right of stoppage *in transitu*, if the seller can show general inability on the part of the buyer to pay his debts.<sup>2</sup>

The vendor stops the goods at his peril; and if he should exercise this right of stoppage in a case where the buyer was not insolvent, he would be liable to the buyer for all the damages which the latter had suffered from the stoppage of the goods, it matters not whether it was the result of malice or of a mistake.<sup>3</sup>

<sup>1</sup> *Benedict v. Schaettle*, 12 Ohio St. 515; *Loeb v. Peters*, 63 Ala. 249; *Gustine v. Phillips*, 38 Mich. 675; *O'Brien v. Norris*, 16 Md. 122; *Schwabacher v. Kane*, 18 Mo. App. 126; *More v. Lott*, 13 Nev. 380; *Buckley v. Furniss*, 15 Wend. 137; *Bender v. Bowman*, 2 Pearson, 517; *White v. Mitchell*, 38 Mich. 390; *Blum v. Marks*, 21 La. An. 268; *Reynolds v. Boston Maine R. Co.*, 43 N. H. 589; *Naylor v. Dennie*, 8 Pick. 198; *Stevens v. Wheeler*, 27 Barb. 658. But see *Rogers v. Thomas*, 20 Conn. 53.

<sup>2</sup> *O'Brien v. Norris*, 16 Md. 122, 132; *Durgy Cement, &c., Co. v. O'Brien*, 123 Mass. 12, 13; *Bloomington v. Memphis, &c., R. R. Co.*, 6 Lea, 616, 628; *More v. Latt*, 13 Nev. 376; *Blum v. Marks*, 21 La. An. 268; *Secomb v. Nutt*, 14 B. Mon. 261; *Lee v. Kilburn*, 3 Gray, 595, 599; *Walsh v. Blakely*, 9 Pac. Rep. (Mont.) 809; *Benedict v. Schaettle*, 12 Ohio St. 515, 519; *Naylor v. Dennie*, 8 Pick. 198; *Hays v. Mouille*, 14 Pa. St. 48, 51. The mere fact that a creditor of the buyer has attached his goods in transit would not be sufficient; there must be a general inability to pay. *Gustine v. Phillips*, 38 Mich. 674. See also for definitions of legal insolvency, *Thompson v. Thompson*, 4 Cush. 127; *Herrick v. Borst*, 4 Hill 650; *Chandler v. Fulton*, 10 Tex. 2. But see *Rogers v. Thomas*, 20 Conn. 54.

<sup>3</sup> *More v. Lott*, 13 Nev. 376; *The Constantia*, 6 Rob. Adm. 321; *Benedict v. Schaettle*, 12 Ohio St. 513, 518.

§ 136. **Mode of exercising the right.** — The vendor is not required to regain the actual possession of the goods, in order to assert his claim. It is sufficient if he gives notice to the common carrier to hold the goods subject to his order.<sup>1</sup> But the notice must be served on the person or carrier who has the custody of the goods. It cannot be served on the vendee.<sup>2</sup> And where the goods are aboard ship, the notice must be given, either directly or indirectly, to the master of the vessel, or to whatever officer is in charge of the goods. If the notice is sent to the consignee or owner of the ship, to be effective as a stoppage of goods *in transitu* it must be given in time to enable this notice to be communicated to the officer, who has charge of the goods, the master, the supercargo or purser, before he has delivered the goods to the vendee.<sup>3</sup>

There must, of course, be a sufficient description of the goods, to enable an identification of them.<sup>4</sup>

§ 137. **Effect of stoppage of goods on rights of carrier.** — If the carrier has been duly notified of the stoppage of the goods, he is obliged to hold them subject to the seller's order, and if he delivers them to any one else, he is liable to the seller.<sup>5</sup> But if the goods have been taken out of the possession of the carrier by an officer of the law under an execution or attachment, before the carrier receives the notice of the stoppage of the goods, he is

<sup>1</sup> *Newhall v. Vargas*, 13 Me. 98; *Rucker v. Donovans*, 18 Kans. 251; *Reynolds v. Boston & Me. R. R. Co.*, 49 N. H. 580; *O'Brien v. Norris*, 16 Md. 122, 130; *Seymour v. Newton*, 105 Mass. 272, 275; *Kemp v. Falk*, L. R. 7 App. Cas. 585; *Litt v. Cowley*, 7 Taunt. 168.

<sup>2</sup> *Mottram v. Heyer*, 5 Denio, 629, 684. But see apparently *contra*, *Bell v. Moss*, 5 Whart. 206.

<sup>3</sup> *Whitehead v. Anderson*, 9 M. & W. 518; *Kemp v. Falk*, 8 App. Cas. 585. But see *Ex parte Falk*, 14 Ch. D. 446; C. A. 455.

<sup>4</sup> *Clements v. Grand Trunk Ry. Co.*, 42 Up. Can. Q. B. 263, 270.

<sup>5</sup> *Bloomington v. Memphis, &c., R. R. Co.*, 6 Lea, 616; *Ascher v. Grand Trunk Ry. Co.*, 36 Up. Can. Q. B. 609; *Howatt v. Davis*, 5 Munf. 34; *Childs v. Northern Ry. Co.*, 25 Up. Can. Q. B. 165.

not required to communicate the notice to the officer in charge of the goods.<sup>1</sup>

But the seller exercises his right of stoppage, in any event, subject to the carrier's lien for freight; and the seller is not entitled, as against the carrier, to the possession of the goods, until the freight charges have been paid.<sup>2</sup>

<sup>1</sup> French v. Star Union Transportation Co., 184 Mass. 288.

<sup>2</sup> Potts v. New York, &c., R. R. Co., 131 Mass. 455; Rucker v. Donovan, 18 Kans. 256; Oppenheim v. Russell, 8 Bos. & P. 42.

## CHAPTER XII.

### PAYMENT AND TENDER.

- SECTION 139.** Effect of payment and tender.
- 140. What constitutes a sufficient or legal tender.
  - 141. Who may make payment.
  - 142. To whom payment may be made—Authority of agents to receive payment.
  - 143. Payment made with what.
  - 144. Payment by note or bill, when absolute or conditional.
  - 145. Payment by checks.
  - 146. Presumptions in respect to absolute and conditional payment, how rebutted.
  - 147. Right of action suspended by taking bill or note in payment of debt.
  - 148. Duties of holder of bill or note taken in payment.
  - 149. Payment in counterfeit or worthless bills.
  - 150. Payment in specific articles.
  - 151. Payment by set-off.
  - 152. Appropriation of payments.
  - 153. Payment on Sunday.
  - 154. Payment by mail.

§ 139. **Effect of payment and tender.**—The payment of the price of a contract of sale, in the case of a cash transaction, entitles the buyer to the possession of the goods,<sup>1</sup> and in every case it constitutes a complete satisfaction of the buyer's obligations under the contract.

Nothing but payment or some other equivalent satisfaction can discharge the buyer from his obligations under the contract of sale. But if the buyer, in proper form, makes a good tender of payment, while he does not thereby discharge his obligation for the price, he relieves himself from liability for damages on account of breach of duty. He is

<sup>1</sup> See *ante*, § 98.

not only relieved of liability for costs, but also for subsequently accruing interest.<sup>1</sup> But he would, of course, remain liable for all interest and costs, which had accrued, when the tender was made, although the buyer was unaware of their accrument.<sup>2</sup> But, since the tender has to be kept up, in order to avoid costs and interest, it is probably necessary to bring the money into court, in the case of a suit, in order to prevent the attachment of costs.<sup>3</sup>

§ 140. What constitutes a sufficient or legal tender.— In order that the tender may operate as a defense to any claim for subsequent costs and interest, it must contain all all the requirements of the law for a legal tender.

1. *In the first place*, the tender must be made in that currency, which the law makes a legal tender in payment of debts.

The legal tender, in the United States, constitutes at present the gold and silver coin of the denomination of one dollar and over, and the United States treasury notes. The constitutionality of the acts of Congress, which have made these notes legal tender, has been very seriously questioned and in one case denied by the Supreme Court of the United States,<sup>4</sup> the position being taken that Congress had no power to make legal tender of any thing which had no intrinsic value.<sup>5</sup> But in later cases, the Federal Supreme Court has pronounced these acts constitutional,

<sup>1</sup> *Suffolk Bank v. Worcester Bank*, 5 Pick. 105; *Goff v. Rehoboth*, 2 Cush. 475; *Gracy v. Potts*, 4 Baxt. 395; *Cornell v. Green*, 10 Serg. & R. 14.

<sup>2</sup> *Wright v. Behrens*, 39 N. J. L. 413; *Emerson v. White*, 10 Gray, 351; *Eaton v. Wells*, 22 Hun, 123. See also *Holdridge v. Wells*, 4 Conn. 151; *Ashburn v. Poulter*, 35 Conn. 557. But compare *Haskell v. Brewer*, 11 Me. 258.

<sup>3</sup> See *Pennypacker v. Umberger*, 22 Pa. St. 492; *Wheeler v. Woodward*, 66 Pa. St. 158.

<sup>4</sup> *Hepburn v. Griswold*, 8 Wall. 604.

<sup>5</sup> See *Tiedeman's Limitations on Police Power*, § 90, for a full discussion of this question.

and this may be taken as a definite settlement of the question.<sup>1</sup>

A legal tender cannot, therefore, be made of State bank bills,<sup>2</sup> nor of notes or bills of private individuals, even those of the seller.<sup>3</sup> But if a tender is made of the price in national bank notes, and other notes, which commonly pass current as money, it will be legal and sufficient, unless the seller objects to the character of the money which is tendered to him.<sup>4</sup>

2. *In the second place*, the exact amount must, as a general rule, be tendered. A tender of a part of the price, if not accepted by the seller, has no effect on the rights of the parties under the contract of sale.<sup>5</sup> But if the seller alone knows the exact amount of the price, and he refuses to inform the buyer what it is, the buyer can make a legal tender, by tendering a reasonable sum in payment. Any reasonable deficiency in the amount tendered will not interfere with what would otherwise be the effect of the tender.<sup>6</sup>

3. The money must be produced, and offered to the seller unless its production is waived. A mere offer to pay without production will ordinarily not suffice.<sup>7</sup> The possession

<sup>1</sup> Legal Tender Cases, 12 Wall. 457; Dooley v. Smith, 13 Wall. 605; Bigler v. Waller, 14 Wall. 298; Railroad Co. v. Johnson, 15 Wall. 195; Juillard v. Greenman, 110 U. S. 421.

<sup>2</sup> Moody v. Mahurin, 4 N. H. 296; Coxe v. State Bank, 8 N. J. L. 172; Donaldson v. Benton, 4 Dev. & Bat. 485.

<sup>3</sup> Cary v. Bancroft, 14 Pick. 315; Wilmarth v. Mountford, 4 Wash. C. C. 79; Bellows v. Smith, 9 N. H. 285; Barker v. Walbridge, 14 Minn. 469.

<sup>4</sup> Ward v. Smith, 7 Wall. 447; Williams v. Rorer, 7 Mo. 556; Towson v. The Havre-de-Grace Bank, 6 Har. & J. 58; Snow v. Perry, 9 Pick. 542; Ball v. Stanley, 5 Yerg. 199; Fosdick v. Van Husom, 21 Mich. 567; Lowell v. Henry, 6 Ala. 226; Hoyt v. Byrnes, 11 Me. 475; Brown v. Dysinger, 1 Rawle, 408; Wheeler v. Knaggs, 8 Ohio, 169; Harding v. Commercial Line Co., 84 Ill. 251; Warren v. Mains, 7 Johns. 476.

<sup>5</sup> Wright v. Behrens, 39 N. J. L. 413.

<sup>6</sup> Nelson v. Robson, 17 Minn. 284; see Oakland Bank v. Applegarth, 67 Cal. 86.

<sup>7</sup> Breed v. Hurd, 6 Pick. 356; Sheredine v. Gaul, 2 Dall. 190; Potts v.

of the money, either actual,<sup>1</sup> or potential, as when the debtor's friend is present and willing to pay the money for him,<sup>2</sup> will not be a substitute for a production of the money, unless the production was clearly waived. It is a sufficient production, if the right amount contained in a bag is produced, although the money is not actually counted out.<sup>3</sup> But it has been held to be insufficient, where the money was on the buyer's desk, and tender was made, but the seller did not and could not see it, and went away without making any response;<sup>4</sup> and so, also, where the money was produced, but no sum was mentioned in the tender.<sup>5</sup>

However, the production and even the possession of the money may be waived by the seller, expressly or by implication, as where he refuses to accept payment if the money be produced.<sup>6</sup>

4. The tender must be unconditional, the imposition of any condition on the acceptance of the tender destroys its value. It must be free from all conditions.<sup>7</sup> Although it is not yet settled whether the buyer may ordinarily demand a written receipt on payment of his debt, it is clear that he cannot demand a receipt "in full," or a formal discharge or cancellation of a mortgage<sup>8</sup>—

*Plaisted*, 30 Mich. 149; *Harmon v. Magee*, 57 Miss. 410; *Sargent v. Graham*, 5 N. H. 440; *Fuller v. Little*, 7 N. H. 535.

<sup>1</sup> *Bakeman v. Pooler*, 15 Wend. 637; *Strong v. Blake*, 46 Barb. 227.

<sup>2</sup> *Sargent v. Graham*, 5 N. H. 440.

<sup>3</sup> *Behaley v. Hatch*, Walker (Miss.) 369.

<sup>4</sup> *Mathewson v. Kelly*, 24 Up. Can. C. P. 598.

<sup>5</sup> *Knight v. Abbott*, 30 Vt. 577.

<sup>6</sup> *Hazard v. Loring*, 10 Cush. 267; *Berry v. Nall*, 54 Ala. 451; *Berthold v. Reyburn*, 61 Mo. 595; *Guthman v. Kearn*, 8 Neb. 507; *Sands v. Lyon*, 18 Conn. 18; *Ashburn v. Poulter*, 35 Conn. 553; *Wheeler v. Knaggs*, 8 Ohio, 172.

<sup>7</sup> *Richardson v. Boston Chemical Laboratory*, 9 Met. 52; *Brooklyn Bank v. De Grauw*, 23 Wend. 842; *Cashman v. Martin*, 50 How. Pr. 338; *Cass v. Higenbotam*, 27 Hun, 406; *Tompkins v. Batle*, 11 Neb. 147; *Flake v. Nuse*, 51 Tex. 98; *Rose v. Duncan*, 49 Ind. 269; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579; *Strong v. Blake*, 46 Barb. 227.

<sup>8</sup> *Wood v. Hitchcock*, 20 Wend. 47; *Hepburn v. Auld*, 1 Cranch. 331;

unless a statute requires such a discharge or release to be given.<sup>1</sup>

Finally, the tender must be maintained and kept open; that is, the buyer must always be ready on the subsequent demand of the price by the seller to pay it to him. Any failure to comply with such a demand, would make the original tender of no avail.<sup>2</sup> And if suit is subsequently brought for the price, in order to keep the original tender good, the buyer must pay the price into court for the plaintiff.<sup>3</sup>

§ 141. **Who may make payment.**—The buyer or his duly authorized agent can alone make payment, without the co-operation or assent of the parties. A stranger to the transaction cannot make payment, or tender of payment so as to extinguish the debt or stop the accrument of interest, without the assent of the seller; and such a payment does not give the stranger any claim of exoneration against the buyer, unless he too has assented to the payment.<sup>4</sup>

§ 142. **To whom payment may be made — Authority of agents to receive payment.**—No one, but the seller himself, has the right to receive payment, unless he be the duly authorized agent of the seller. A payment to a third person for the seller but without his authority, does not extinguish the buyer's liability to the seller, or even operate as a tender, although the latter has been informed of the payment.<sup>5</sup>

*Loring v. Cooke*, 3 Pick. 48; *Storey v. Krewson*, 55 Ind. 397; *Richardson v. Boston Chemical Laboratory*, 9 Met. 48; *Thayer v. Brackett*, 12 Mass. 450; *Jewett v. Earle*, 21 Jones & Sp. 349.

<sup>1</sup> *Saunders v. Frost*, 5 Pick. 270; *Balme v. Wambaugh*, 16 Minn. 116.

<sup>2</sup> *Dodger v. Fearly*, 19 Hun, 277; *Parks v. Alten*, 42 Mich. 482; *Gray v. Augler*, 62 Ga. 596; *Town v. Trow*, 24 Pick. 168; *Crain v. McGoon*, 86 Ill. 431; *Thayer v. Meeker*, 86 Ill. 470; *Carr v. Miner*, 92 Ill. 604.

<sup>3</sup> *Becker v. Boon*, 61 N. Y. 317; *Gilkeson v. Smith*, 15 W. Va. 44; *Hamlett v. Tallman*, 80 Ark. 505.

<sup>4</sup> *Neely v. Jones*, 16 W. Va. 625; *Sinclair v. Learned*, 51 Mich. 335.

<sup>5</sup> *Town v. Trow*, 24 Pick. 168; *Breed v. Hurd*, 6 Pick. 356.



But the agent in order that he may have the power to receive payment for the seller, need not be expressly authorized. The authority may be implied from a variety of circumstances depending upon custom and usage.<sup>1</sup> The mere authority to sell, which the ordinary broker, salesman or drummer possesses, in the absence of any right to the possession of the goods, or of the bills of account for collection, will not imply the power to collect and receive payment.<sup>2</sup> But the agent will be presumed to have the power to receive payment for the seller, if in selling the goods he is given the possession of them,<sup>3</sup> or if he has the possession of the bills of account although he did not sell the goods.<sup>4</sup> An attorney at law, who is given a claim to collect, is always authorized to receive payment and give a release.<sup>5</sup> But an officer who serves a writ of attachment or execution, is never impliedly authorized to receive payment.<sup>6</sup>

Where the buyer has a good reason for believing the

<sup>1</sup> See *Meyer v. Stone*, 46 Ark. 210.

<sup>2</sup> *Higgins v. Moore*, 36 N. Y. 417; *Kornemann v. Monahan*, 24 Mich. 86; *Abrahams v. Miller*, 87 Ill. 179; *Clark v. Smith*, 88 Ill. 298; *Greenhood v. Keator*, 9 Bradw. 183; *Law v. Stokes*, 32 N. J. L. 250; *Hirshfield v. Waldron*, 54 Mich. 649; *Dunn v. Wright*, 51 Barb. 244; *Harrison v. Boss*, 12 Jones & Sp. 230; *Greenleaf v. Eagan*, 30 Minn. 316; *Chambers v. Short*, 79 Mo. 204; *Janney v. Boyd*, 30 Minn. 319; *Seiple v. Irwin*, 30 Pa. St. 513; *Kohn v. Washer*, 64 Tex. 181; *Butler v. Dorman*, 68 Mo. 298; *Bernshouse v. Abbott*, 45 N. J. L. 531; *McKindly v. Dunham*, 55 Wis. 515. See *contra*, *Hoskins v. Johnson*, 5 Sneed, 469; *Collins v. Newton*, 7 Baxt. 269; *Trainer v. Morrison*, 78 Me. 160; *Putnam v. French*, 53 Vt. 402.

<sup>3</sup> *Whiton v. Spring*, 74 N. Y. 173; *Rice v. Graftman*, 56 Mo. 434; *Harris v. Simmerman*, 81 Ill. 413. But if the buyer knows that the agent has not the power to receive payment, or deliver goods which he sells, the buyer cannot claim title or release from liability, as against the principal. *Cummins v. Beaumont*, 68 Ala. 204.

<sup>4</sup> *Adams v. Humphreys*, 54 Ga. 496. See *Kinsman v. Kershaw*, 119 Mass. 140.

<sup>5</sup> *Gray v. Wass*, 1 Greenl. 257; *Ducett v. Cunningham*, 39 Me. 886; *Brackett v. Norton*, 4 Conn. 517; *Branch v. Burnley*, 1 Call. 147.

<sup>6</sup> *Walte v. Delesdernier*, 15 Me. 144.

party selling the goods to be the principal, a payment to the supposed principal but actual agent will be binding on the seller.<sup>1</sup>

But the agent's authority terminates with the revocation of the agency. If the agency is terminated by the death of the principal, the agent's authority is revoked *instantly*, and a subsequent payment to the agent would not be binding on the estate of the deceased principal, although the buyer did not know of the revocation of the agency,<sup>2</sup> unless the money so paid to the ex-agent goes to the benefit of the deceased principal's estate.<sup>3</sup> But if the agency is revoked in any other way, the payment to the agent will be binding on the principal, as long as the principal does not give out the proper notice of the revocation of the agency.<sup>4</sup>

The agent who has the authority to collect has only the authority to receive money in payment. Any other mode of settlement is beyond his authority.<sup>5</sup>

§ 143. **Payment made with what.** — Payment can only be made with money, *i.e.*, legal tender, except with the consent of the creditor. If a contract calls in general terms for the payment of a given sum of dollars, the payer can make payment in any kind of legal tender, and the creditor cannot insist upon the selection of any one kind with which to make payment. And even where one kind of legal tender is depreciated in value, as in the case of the United States treasury notes, during and after the Ameri-

<sup>1</sup> *Eclipse Windmill Co. v. Thornton*, 46 Iowa, 181; *Peel v. Shepherd*, 58 Ga. 365; *Pratt v. Collins*, 20 Hun, 126; *Wright v. Cabot*, 89 N. Y. 570.

<sup>2</sup> *Clayton v. Merrett*, 52 Miss. 353; *Gale v. Tappan*, 12 N. H. 145. But see *Cassidy v. McKenzie*, 4 Watts & S. 282.

<sup>3</sup> *Dick v. Page*, 17 Mo. 284.

<sup>4</sup> *Packer v. Hinckley Locomotive Works*, 122 Mass. 484.

<sup>5</sup> *Aultman v. Lee*, 48 Iowa, 404; *Langston v. Maitland*, 11 Gill. & J. 286; *Bevis v. Heflin*, 63 Ind. 129; *Falls v. Gaither*, 9 Port. (Ala.) 605; *Burks v. Hubbard*, 69 Ala. 379; *Broughton v. Silloway*, 114 Mass. 71.

can civil war, it does not interfere with the right of the debtor to select the depreciated money.<sup>1</sup> And the selection of the more valuable kind of legal tender, does not entitle the debtor to any discount in compensation of the difference in value between the coin and the depreciated treasury notes.<sup>2</sup> But if the government has changed the intrinsic value of the coins, without changing their denominations after a contract has been made, the contract can only be fully performed by a tender of the value of the given amount of money, according to the old standard of value.<sup>3</sup>

But if the contract calls for any particular kind of legal tender, it can only be satisfied by a tender of that kind, and the holder may refuse to receive any other.<sup>4</sup> If, however, in such a case the depreciated treasury notes are tendered and accepted, in payment of the debt, the creditor can only require a payment to him of the amount called for by the contract and cannot insist upon the payment of a premium, to compensate the difference in value between the gold and the treasury notes.<sup>5</sup>

While nothing but money can be lawfully tendered in payment of a bill or note<sup>6</sup> the parties themselves may agree

<sup>1</sup> Killough v. Alford, 32 Tex. 457.

<sup>2</sup> Bush v. Baldrey, 11 Allen, 367.

<sup>3</sup> Pilkinton v. Coms. of Claims, 2 Knapp, 17; Da Costa v. Cole, Holt, 465; Skin. 272; Field, J., in Juillard v. Greenman, 110 U. S. 465.

<sup>4</sup> Bronson v. Rhodes, 7 Wall. 245; Butler v. Horwitz, 7 Wall. 259; Dewing v. Scars, 11 Wall. 379; Treblock v. Wilson, 12 Wall. 687; Phillips v. Dugan, 21 Ohio St. 466; McGoon v. Shirk, 54 Ill. 408 (overruling Humphrey v. Clement, 44 Ill. 299; Whetstone v. Colley, 36 Ill. 328); Smith v. Wood, 37 Tex. 620; Luck v. Falkner, 25 Cal. 404; Higgins v. B. R. & Am. & M. Co. 27 Cal. 158; Stark v. Coffin, 105 Mass. 335; Currier v. Davis, 111 Mass. 480; Independent Ins. Co. v. Thomas, 104 Mass. 192; Warren v. Franklin Ins. Co., 104 Mass. 518. But see Wood v. Bullens, 6 Allen, 518; Killough v. Alford, 32 Tex. 457, where the paper being payable "in gold coin or the equivalent thereof in the United States legal tender notes," was held to be discharged by the payment of the given number of dollars in United States treasury notes.

<sup>5</sup> Gilman v. County of Douglass, 6 Nev. 27.

<sup>6</sup> See ante, § 140.

upon the use of something else in payment.<sup>1</sup> But an agent cannot, without explicit authority, receive anything but money in liquidation of a debt.<sup>2</sup>

It is not necessary, however, that the money should exchange hands. The mere giving of credit by the payee to the payor, will constitute a payment, if accepted.<sup>3</sup> The effect of making payment with checks is discussed elsewhere.<sup>4</sup>

§ 144. **Payment by note or bill, when absolute or conditional.**— This has been a much mooted question in the courts, and, as is usual, when the reasons for the opposing theories are themselves doubtful, the courts are found to have rendered contradictory decisions. A terse statement will be given of the various conclusions reached, but if it is at all possible to formulate a rule that will approximately reconcile the otherwise conflicting decisions, it would be that a private bill or note, — excluding bank-notes and government treasury notes which are currency and pass as and for money, — when given in payment of a debt, does not constitute an absolute payment, until it itself has been paid, unless the parties have expressly or impliedly agreed that the note or bill shall be taken in absolute satisfaction of the debt; and this is true, although the bill or note is given in payment of a debt of a different character, such as an open account, or a judgment. But the decisions will be found at times to run counter to this rule.

It has thus been decided in most of the courts, that if the debtor gives his own note or bill in liquidation of the debt,

<sup>1</sup> See *post*, §§ 144-146, 150, 151.

<sup>2</sup> *De Mets v. Dogon*, 53 N. Y. 685; *Moye v. Cogdell*, 69 N. C. 93; *Herimon v. Shomon*, 24 Kan. 387; *Bank of Kansas City v. Mills*, 24 Kan. 610; *Maddur v. Bevan*, 39 Md. 485; *Speur v. Ledergerber*, 56 Mo. 465; *Chapman v. Cowles*, 41 Ala. 108.

<sup>3</sup> *Savage v. Merle*, 5 Pick. 83; *Pacific Bank v. Mitchell*, 9 Met. 297.

<sup>4</sup> See *post*, § 145.

it will be a conditional payment, whether the debt is precedent,<sup>1</sup> or contemporaneous, as where one's note is given

<sup>1</sup> *Clark v. Young*, 1 Cranch, 181; *Bank of United States v. Daniel*, 12 Pet. 32; *Peters v. Beverly*, 10 Pet. 532; *Downey v. Hicks*, 14 How. 240; *The Kimball*, 3 Wall. 45; *Sheehy v. Mandeville*, 6 Cranch, 253; *McGuire v. Gadsby*, 3 Call, 324; *Middlesex v. Thomas*, 5 C. E. Green, 89; *Clopper v. Union Bank*, 7 Har. & J. 120; *Miller v. Lumsden*, 16 Ill. 161; *Archibald v. Argall*, 58 Ill. 307; *Logan v. Attix*, 7 Iowa, 77; *Davis' Estate*, 5 Whart. 537; *Jones v. Strawhan*, 4 Watts & S. 261; *McIntyre v. Kennedy*, 29 Pa. St. 448; *Merrick v. Boury*, 5 Ohio St. 60; *Sutcliffe v. Atwood*, 15 Ohio St. 186; *Cole v. Sackett*, 1 Hill, 516; *Winsted Bank v. Webb*, 39 N. Y. 325; *Hawley v. Foote*, 19 Wend. 516; *Frisbie v. Larned*, 21 Wend. 450; *Smith v. Miller*, 43 N. Y. 171; *Board of Education v. Fonda*, 77 N. Y. 850; *McNiel v. McCamley*, 6 Tex. 168; *Marshall v. Marshall*, 42 Ala. 149; *Myatts v. Bell*, 41 Ala. 222; *Stam v. Kerr*, 31 Miss. 199; *Guion v. Doherty*, 43 Miss. 538; *Smith v. Owens*, 21 Cal. 11; *Poole v. Rice*, 9 W. Va. 73; *Feamster v. Withrow*, 12 W. Va. 611; *Walsh v. Lennon*, 98 Ill. 27; *Crawford v. Roberts*, 50 Cal. 236; *Wilbur v. Jernegan*, 11 R. I. 113; *Nightingale v. Chafee*, 11 R. I. 609; *McCluny v. Jackson*, 6 Gratt. 96; *Lewis v. Davison*, 29 Gratt. 226; *Armistead v. Ward*, 2 Pat. & H. 515; *Glenn v. Smith*, 2 Gill & J. 512; *Walton v. Bemiss*, 16 La. 140; *McLaren v. Hall*, 26 Iowa, 298; *Steamboat Charlotte v. Hammond*, 9 Mo. 63; *Yarnell v. Anderson*, 14 Mo. 619; *Doebbling v. Loss*, 40 Mo. 150; *Dougal v. Cowles*, 5 Day, 511; *Burdick v. Green*, 15 Johns. 249; *Gordon v. Price*, 10 Ired. 385; *Union Bank v. Smiser*, 1 Sneed, 501; *Welch v. Allington*, 23 Cal. 322; *Breitung v. Lindauer*, 37 Mich. 217; *Smith v. Chester*, 1 T. R. 655; *Price v. Price*, 16 M. & W. 232; *Richardson v. Rickman*, 5 T. R. 517; *Day v. Thompson*, 65 Ala. 269; *Costar v. Davies*, 8 Ark. 213; *Brugman v. McGuire*, 32 Ark. 733; *Brewster v. Bours*, 8 Cal. 506; *Griffith v. Grogan*, 12 Cal. 321; *Brown v. Olmsted*, 50 Cal. 162; *Bill v. Porter*, 9 Conn. 23; *Clark v. Savage*, 20 Conn. 258; *May v. Gamble*, 14 Fla. 467; *Morrison v. Smith*, 81 Ill. 221; *Wilhelm v. Schmidt*, 84 Ill. 188; *Kappes v. White Hard Wood Lumber Co.*, 1 Bradw. 280; *Edwards v. Trulock*, 37 Iowa, 244; *Farwell v. Grier*, 38 Iowa, 83; *Berry v. Griffin*, 10 Md. 27; *Morrison v. Welty*, 18 Md. 169; *Haines v. Pearce*, 41 Md. 221; *Case v. Leass*, 44 Mich. 195; *Brown v. Dunckel*, 46 Mich. 29; *Lear v. Friedlander*, 45 Miss. 559; *Partee v. Bedford*, 51 Miss. 84; *Wadlington v. Covert*, 51 Miss. 631; *Appelton v. Kennon*, 19 Mo. 637; *McMurray v. Taylor*, 30 Mo. 268; *Howard v. Jones*, 33 Mo. 583; *Leabo v. Goods*, 67 Mo. 126; *Hughes v. Israel*, 73 Mo. 538; *Young v. Hibbs*, 5 Neb. 433; *Jaffrey v. Cornish*, 10 N. H. 505; *Johnson v. Cleaves*, 15 N. H. 332; *Foster v. Hill*, 36 N. H. 526; *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 39; *Ayers v. Van Lien*, 5 N. J. L. 765; *Emerine v. O'Brien*, 36 Ohio St. 491; *Sweet v. James*, 2 R. I. 271; *Wheeler v. Schroeder*, 4 R. I. 383; *Hughes v. Wheeler*, 8 Cow.

in immediate settlement of some purchase or other contract.<sup>1</sup>

Where a stranger's note or bill is transferred in satisfaction of a debt, the cases are still more at variance. Where such a note or bill is given for a precedent debt, it is very

77; *Tobey v. Barber*, 5 Johns. 68; *Schermerhorn v. Loines*, 7 Johns. 813; *Gregory v. Thomas*, 20 Wend. 17; *Waydell v. Luer*, 5 Hill, 44; *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Feldman v. Beier*, 78 N. Y. 293; *Nat. Bank of Newburgh v. Bigler*, 88 N. Y. 51; *Thompson v. British No. Am. Bank*, 82 N. Y. 1; *Parfott v. Colby*, 71 N. Y. 597; *Vail v. Thomas*, 4 N. Y. 312; *Spear v. Atkinson*, 1 Ired. L. 262; *Matasce v. Hughes*, 7 Oreg. 60; *McGinn v. Holmes*, 2 Watts, 121; *Weakley v. Bells*, 9 Watts, 273; *Leas v. James*, 10 S. & R. 307; *Brown v. Scott*, 51 Pa. St. 357; *League v. Waring*, 85 Pa. St. 244; *Hunter v. Moue*, 98 Pa. St. 13; *Watson v. Owens*, 1 Rich. L. 111; *Kelsey v. Rosbrough*, 2 Rich. 241; *Bank v. Bobo*, 9 Rich. 31; *Mars v. Conner*, 9 S. C. 70; *Dunlap v. Shanklin*, 10 W. Va. 662; *Eastman v. Porter*, 14 Wis. 39; *Ford v. Mitchell*, 15 Wis. 368; *Lindsey v. McClelland*, 18 Wis. 481; *Mehlberg v. Tisher*, 24 Wis. 607; *Paine v. Voorhees*, 26 Wis. 526; *Matteson v. Ellsworth*, 33 Wis. 488. But in several of the States, it is held that the taking of a bill or note is presumptively an absolute payment, but parol evidence is admissible to rebut this presumption. *Ely v. James*, 123 Mass. 36; *Parkham Sewing M. Co. v. Brock*, 113 Mass. 194; *Gaskins v. Well*, 15 Ind. 253; *Smith v. Bettger*, 68 Ind. 254; *Hutchins v. Olcott*, 4 Vt. 549; *Torrey v. Baxter*, 13 Vt. 452; *Dickinson v. King*, 28 Vt. 378; *Farr v. Stephens*, 26 Vt. 299; *Varner v. Nobleborough*, 2 Greenl. 124; *Gilmore v. Bussey*, 12 Me. 418; *Gooding v. Morgan*, 37 Me. 619; *Ward v. Bourne*, 56 Me. 161; *Thatcher v. Dinsmore*, 5 Mass. 302; *Chapman v. Durant*, 10 Mass. 51; *Wood v. Bodwell*, 12 Mass. 289; *Dodge v. Emerson*, 131 Mass. 467; *Green v. Russell*, 132 Mass. 536; *Rowe v. Collier*, 25 Tex. 252; *Hunt v. Boyd*, 2 La. 109; *Butts v. Dean*, 2 Met. 76; *House v. Alexander*, 2 Met. 157; *Curtis v. Hubbard*, 9 Met. 328; *Meldege v. Boston Iron Co.*, 5 Cush. 170; *Connecticut Trust Co. v. Melendy*, 119 Mass. 449; *Descadillas v. Harris*, 3 Greenl. 298; *Fowler v. Ludwig*, 34 Me. 455; *Kidder v. Knox*, 48 Me. 551; *Paine v. Dwinell*, 53 Me. 52; *Mehan v. Thompson*, 71 Me. 492; *Bunker v. Barron*, 3 New Eng. Rep. 597; *Walt v. Brewster*, 31 Vt. 516; *Arnold v. Sprague*, 34 Vt. 402; *Welmet v. Missisquoi Lime Co.*, 46 Vt. 458; *Jewett v. Pleak*, 43 Ind. 368; *Maxwell v. Day*, 45 Ind. 509; *Hill v. Sloan*, 59 Ind. 181; *Schneider v. Kolthoff*, 59 Ind. 568; *Teal v. Spangler*, 72 Ind. 380; *Krutsinger v. Brown*, 72 Ind. 466.

<sup>1</sup> 2 Am. Lead. Cas. 263; *Sheehy v. Mandeville*, 6 Cranch, 253; *Story on Notes*, § 104. But see *contra* 2 Parsons' N. & B. 157, where Mr. Parsons pronounces the transaction "to be substantially selling a note by barter, or exchanging it for goods."

generally held to be only a conditional payment, whether the paper is payable to order and indorsed, or is payable to bearer and unindorsed, by the debtor.<sup>1</sup> But where the note or bill of a stranger is given in satisfaction of a contemporaneous debt, it is held to be an absolute payment, if it is payable to bearer and is transferred without indorsement;<sup>2</sup> and a conditional payment, if it is payable to order and is transferred by indorsement, the reason for this distinction being that the conditional liability of an indorser is inconsistent with the presumption of an absolute payment.<sup>3</sup>

But the parties to the contract may agree in any of these cases that the third person's note is to be taken in absolute payment of the debt. And it would seem to be an absolute payment, whether the note itself be paid at maturity, or not.<sup>4</sup>

<sup>1</sup> *Camidge v. Allenby*, 6 B. & C. 373; *Wart v. Woolley*, 3 B. & C. 439; *s. c.* 5 Dow. & R. 374; *Swinyard v. Boyes*, 5 M. & S. 62; *Ex parte Blackburne*, 10 Ves. 204; *League v. Wasinn*, 85 Pa. St. 244; *M'Lughan v. Bovard*, 4 Watts, 315; *Downey v. Hicks*, 14 How. 249; *Crane v. McDonald*, 45 Barb. 355; *Gibson v. Tobey*, 53 Barb. 195; *Noel v. Murray*, 3 Kern. 169; 1 Duer, 388; *Gordon v. Price*, 10 Ired. L. 388; *Gallagher v. Roberts*, 2 Wash. C. C. 193; *Johnson v. Weed*, 9 Johns. 310; *Vail v. Foster*, 4 N. Y. 312. But see *contra* *Dennis v. Williams*, 40 Ala. 633; *Ely v. James*, 123 Mass. 37. In *Stain v. Ker*, 31 Miss. 199; *Soffe v. Gallagher*, 3 E. D. Smith, 507, held to be absolute payment, where it is transferred with indorsement. *Contra* *Cook v. Beech*, 10 Humph. 413.

<sup>2</sup> *Breed v. Cook*, 15 Johns. 242; *Bank of England v. Newman*, 1 Ld. Raym. 442; *Ex parte Blackburne*, 10 Ves. 204; *Fydell v. Clarke*, 1 Esp. 447; *Tobey v. Barber*, 5 Johns. 68; *Gibson v. Tobey*, 53 Barb. 195; *Whitbeck v. Vanners*, 11 Johns. 409; *Noel v. Murray*, 1 Duer, 388; *Camidge v. Allenby*, 6 B. & C. 373; 2 *Parsons' N. & B.* 156, 183. But presumption may be rebutted by parol evidence. *Torrey v. Hadley*, 27 Barb. 196; *Porter v. Talcott*, 1 Cow. 381; *Rew v. Barber*, 3 Cow. 279; *Gordon v. Price*, 10 Ired. L. 388.

<sup>3</sup> *Monroe v. Huff*, 5 Den. 369; *Soffe v. Gallagher*, 3 E. D. Smith, 507; *Boyd v. Hitchcock*, 20 Johns. 76; *Shriner v. Keller*, 25 Pa. St. 61; 2 *Am. Lead Cas.* 263; 2 *Parsons' N. & B.* 159.

<sup>4</sup> *Conkling v. King*, 10 N. Y. 440; *Noel v. Murray*, 13 N. Y. 167; *N. Y. State Bank v. Fletcher*, 5 Wend. 85; *Torrey v. Hadley*, 27 Barb. 192; *Wise v. Chase*, 43 N. Y. 159; *Bicknell v. Waterman*, 5 R. I. 43. But see,

§ 145. **Payment by checks.** — Where a check is transferred in settlement of a debt, the implication of law is that it is not to constitute an *absolute* discharge of the debt, until the check is presented by the creditor and paid or certified on such presentment,<sup>1</sup> or it is shown that the creditor failed to make a presentment of the check within a reasonable time, and that the bank or drawee subsequently fails to the damage of the drawer.<sup>2</sup> But, as in the case of payment by notes, the parties may agree that the check shall be taken as an absolute payment of the debt, and it will then have that effect.<sup>3</sup>

§ 146. **Presumptions in respect to absolute and conditional payment, how rebutted.** — It has been already intimated that the presumption of law, in respect to the character of the payment, when it is made by a note or bill, is not conclusive, but may be rebutted by proof of a contrary intention, whether the presumption was in favor

*contra*, *Benedict v. Field*, 16 N. Y. 595; *Roberts v. Fisher*, 43 N. Y. 159; *Roget v. Merritt*, 2 Caines, 117.

<sup>1</sup> *People v. Baker*, 20 Wend. 602; *Ocean Tow Boat Co. v. Ship Ophelia*, 11 La. Ann. 28; *Phillips v. Bullard*, 58 Ga. 256; *Tapley v. Marstens*, 8 T. R. 451; *Blair & Hoge v. Wilson*, 28 Gratt. 165; *Currie v. Misa*, L. R. 10 Exch. 153; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Bradford v. Fox*, 88 N. Y. 289; *Smith v. Miller*, 43 N. Y. 151; 52 N. Y. 546; *Davison v. City Bank*, 57 N. Y. 82; *Sweet v. Titus*, 11 N. Y. S. C. (4 Hun) 639; *Everett v. Collins*, 2 Camp. 515; *Hearth v. Rhodes*, 66 Ill. 351; *Kerneyer v. Newlet*, 14 Kan. 164; *Phillips v. Bullard*, 58 Ga. 256; *De Yampert v. Brown*, 28 Ark. 166; *Mordis v. Keunedy*, 23 Kan. 408; *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 89; *Broughton v. Silloway*, 114 Mass. 71; *Thompson v. Bank*, 82 N. Y. 1.

<sup>2</sup> *Taylor v. Wilson*, 11 Met. 44; *Hodgson v. Barrett*, 33 Ohio St. 63; *Syracuse, &c., R. R. Co. v. Collins*, 8 Lans. 38; *Warriner v. The People*, 74 Ill. 346; *McIntyre v. Kennedy*, 29 Pa. St. 448; *Weddigen v. Boston Electric, &c., Co.*, 100 Mass. 422; *Redpath v. Kolfage*, 16 Up. Can. Q. B. 438; *Mehlberg v. Fisher*, 24 Wis. 607; *Smith v. Miller*, 43 N. Y. 171; *McIntyre v. Kennedy*, 29 Pa. St. 448; *Thayer v. Peck*, 93 Ill. 357; *Getchell v. Chase*, 124 Mass. 366; *Cushman v. Libby*, 15 Gray, 358; *Barnard v. Graves*, 16 Pick. 41.

<sup>3</sup> *Blair v. Wilson*, 28 Gratt. 165.



of its absolute or conditional character. In some of the cases it has been held that the presumption could be rebutted by proof of an express agreement to the contrary, especially to rebut the presumption of a conditional payment.<sup>1</sup> But the better opinion is that the agreement may be implied from the surrounding circumstances.<sup>2</sup> As a rule, however, the mere acknowledgment of payment in full, or of payment in general, could not be sufficient to rebut the presumption of conditional payment without the aid of corroborating circumstances.<sup>3</sup> But it has been held that the words "received and accepted in satisfaction," coupled with the giving of security in the shape of an indorsement by a third person, will establish the presumption of an absolute payment.<sup>4</sup> The mere surrender of a security is not sufficient.<sup>5</sup> If a creditor accepts the bill of

<sup>1</sup> *Muldon v. Whitlock*, 1 Cow. 290; *Hays v. Stone*, 7 Hill, 128; *Dougal v. Cowles*, 5 Day, 511; *Glenn v. Smith*, 2 Gill & J. 493; *Conkling v. King*, 10 Barb. 372. See *Booth v. Smith*, 3 Wend. 66; *Boyd v. Hitchcock*, 20 Johns. 76; *Butts v. Dean*, 2 Met. 76; *Appleton v. Parker*, 15 Gray, 173; *Follette v. Steele*, 16 Vt. 30; *Thompson v. Wilson*, 27 Ind. 370; *Comstock v. Smith*, 22 Me. 262; *Shumway v. Reid*, 34 Me. 560; *Iowa Co. v. Foster*, 49 Iowa, 676.

<sup>2</sup> *Miller v. Lumsden*, 16 Ill. 161; *Gordon v. Price*, 10 Ired. 335; *Hart v. Boller*, 15 Serg. & R. 162; *Johnson v. Cleaves*, 15 N. H. 332; *Merrick v. Boury*, 4 Ohio St. 60; *Tulford v. Johnson*, 15 Ala. 384; *Berry v. Griffin*, 10 Md. 27; *Slocumb v. Holmes*, 1 How. (Miss.) 139; *White v. Howard*, 1 Sandf. 81; *Harris v. Lindsay*, 4 Wash. C. C. 98, 271.

<sup>3</sup> *Maillard v. Duke of Argyle*, 6 Man. & G. 40; *Muldon v. Whitlock*, 1 Cow. 290; *Putnam v. Lewis*, 8 Johns. 389; *Tobey v. Barber*, 5 Johns. 68; *McLughan v. Bovard*, 4 Watts, 308; *Hotchin v. Secor*, 8 Mich. 494; *Dudgeon v. Haggart*, 17 Mich. 278; *Burchard v. Frazer*, 23 Mich. 228; *Berry v. Griffin*, 10 Md. 27; *Glenn v. Smith*, 2 Gill & J. 494; *Steamboat Charlotte v. Hammond*, 9 Mo. 58; *Gardner v. Gorham*, 1 Dougl. (Mich.) 507; *Feamster v. Withrow*, 12 W. Va. 651; *Maze v. Miller*, 1 Wash. C. C. 328. But see, *contra*, *Barron v. How*, 13 Mart. (La.) 144. A receipt "in full when paid," can only mean conditional payment. *Dayton v. Trull*, 23 Wend. 345.

<sup>4</sup> *Morris v. Harvey*, 75 Va. 726.

<sup>5</sup> *Butts v. Dean*, 2 Met. 76; *Pomeroy v. Rice*, 16 Pick. 22; *Fowler v. Ludwig*, 34 Me. 455.

a third person in payment, when he had the option of taking cash it is held to be an absolute payment, and the original debtor is discharged.<sup>1</sup> But it is only a conditional payment if the creditor has not the option of taking cash.<sup>2</sup>

As a matter of course, any fraudulent misrepresentation of material facts, in making payments with bills and notes, will render the transaction entirely void, and revive the rights and liabilities of the parties on the original debt.<sup>3</sup>

§ 147. **Right of action suspended by taking bill or note in payment of debt.** — Although it is generally held that the acceptance of a bill or note, in satisfaction of a debt, constitutes only conditional payment, it suspends all right of maintaining actions on the original debt, as long as the note or bill given in payment is not matured; the object of the suspension being the prevention of the maintenance of separate actions upon both debts, and a recovery on both, in case the note or bill should be negotiated before maturity.<sup>4</sup> When the note or bill falls due, the right of action is revived, and the creditor has the right to elect on which liability to bring suit.<sup>5</sup> But if he brings suit on the original

<sup>1</sup> *Strong v. Hart*, 6 B. & C. (13 C. C. L. R.) 160.

<sup>2</sup> *Marsh v. Pedder*, 4 Camp. 257; *Taylor v. Briggs*, M. & M. 28; *Robinson v. Read*, 9 B. & C. (17 E. C. L. R.) 444; *Swinyard v. Bowes*, 5 M. & S. 62.

<sup>3</sup> *Hawse v. Crowe*, 1 R. & M. 414; *Bayard v. Shunk*, 1 Watts & S. 94; *Lowrey v. Murrell*, 2 Port. 280; *Long v. Sprull*, 7 Jones L. 96; *Gurney v. Womersley*, 4 E. & B. (82 Eng. C. L. R.) 133; *Popley v. Ashlin*, 6 Mod. 147; *Holt*, 121; *Bridge v. Batchelder*, 9 Allen, 394; *Pierce v. Drake*, 15 Johns. 475; *Martin v. Pennock*, 2 Barr, 376; *Brown v. Montgomery*, 20 N. Y. 287; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Fenn v. Harrison*, 3 T. R. 759; *Roget v. Merrill*, 2 Cal. 117.

<sup>4</sup> *Black v. Zacharie*, 3 How. 483; *Putnam v. Lewis*, 8 Johns. 389; *Stedman v. Gooch*, 1 Esp. 3; *Griffith v. Owen*, 13 M. & W. 53; *Price v. Price*, 16 M. & W. 231; *Armistead v. Ward*, 2 Pat. & H. 504; *Van Epps v. Dillaye*, 5 Barb. 244; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Kearslake v. Morgan*, 5 T. R. 513; *Maler v. Canovan*, 57 How Pr. 504.

<sup>5</sup> *Owenson v. Morse*, 7 T. R. 50; *Bank of Ohio Valley v. Lockwood*,

debt, he must either produce in court and surrender the note or bill given in payment of the debt sued on, or satisfactorily account for its absence, in order to protect the debtor against a negotiation of the note or bill, before maturity, and a consequent liability upon it to some innocent purchaser.<sup>1</sup>

In order that the taking of the bill or note may operate as a suspension of the right of action on the original debt, the entire agreement in respect to the satisfaction of the debt must have been complied with. If the agreement is in part unperformed, as where the agreement was to give a note for the debt, and to pay the costs of a suit begun on the original debt, the failure to pay the costs would enable the creditor to proceed with his suit.<sup>2</sup>

§ 148. **Duties of holder of bill or note taken in payment.** — Wherever a bill or note is given in payment of a debt, whether precedent or contemporaneous, and the debtor becomes liable on such a bill or note as a drawer or indorser, the failure to exercise due diligence in the presentment for payment, and the giving notice of dishonor, will, according to the weight of authority, not only discharge the debtor of his liability as drawer or indorser, but, also, of his liability on the original debt.<sup>3</sup> But there are some author-

18 W. Va. 426; *Stedman v. Gooch*, 1 Esp. 4; *Tobey v. Barber*, 5 Johns. 68; *Price v. Price*, 16 M. & W. 231.

<sup>1</sup> *Cole v. Sackett*, 1 Hill, 516; *Tobey v. Barber*, 5 Johns. 66; *Alcock v. Hopkins*, 6 Cush. 484; *Miller v. Lumsden*, 16 Ill. 161; *Jones v. Savage*, 6 Wend. 658; *Dayton v. Trull*, 23 Wend. 345; *Smith v. Lockwood*, 10 Johns. 367; *Raymond v. Merchant*, 3 Cow. 150; *Lazler v. Nevin*, 3 Hagans (W. Va.), 622; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 427; *Matthews v. Dare*, 20 Md. 248; *Hays v. McClurg*, 4 Watts, 452; *Harris v. Johnson*, 3 Cranch, 311.

<sup>2</sup> *Putnam v. Lewis*, 8 Johns. 389. The same conclusion was reached, notwithstanding the new note had been negotiated. *Norris v. Ayleete*, 2 Camp. 328. Of course payment of the new note or bill would satisfy the debt itself. *Dillon v. Rimmer*, 1 Bing. 100.

<sup>3</sup> *Mauney v. Coit*, 80 N. C. 300; *Berry v. Bridges*, 3 Taunt. 130; *Day-*

ities which maintain that the debtor should not be discharged of his liability on the original debt, unless he has suffered an actual loss in consequence of the laches of the creditor in respect to presentment and notice,<sup>1</sup> applying to that case, the same rule which determines the liability of the debtor, when the bill or note is payable to bearer, and is transferred by delivery and without indorsement. In every such case the liability on the original debt is extinguished only when some loss occurs from the negligence of the creditor in presenting the bill or note for payment, and in giving notice of dishonor.<sup>2</sup>

§ 149. **Payment in counterfeit or worthless bills.** — If a supposed treasury note, bank-bill or private note be counterfeit, and it be offered and received in payment of a debt, it is not a valid payment, and the debtor will be obliged to make a second payment. There would in all such cases be a failure of consideration, since the creditor did not get what he agreed to take in payment, viz. : a treasury note,

*ton v. Trull*, 23 Wend. 345; *Smith v. Miller*, 48 N. Y. 171; *s. c.* 52 N. Y. 546; *Betterton v. Roope*, 3 Lee (Tenn.), 220; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Blanchard v. Tittavawasse Boom Co.*, 40 Mich. 566; *Mehlberg v. Fisher*, 24 Wis. 607; *Allan v. Eldred*, 50 Wis. 136; *Middlesex v. Thomas*, 5 C. E. Green, 39; *Booth v. Smith*, 3 Wend. 66; *Jennison v. Parker*, 7 Mich. 355; *Tobey v. Barber*, 5 Johns. 68; *Peacock v. Purcell*, 14 C. B. (N. S.) 728; *Huston v. Weber*, 3 T. & C. 147; 7 Hun, 120. The same conclusion is reached, where the note or bill is transferred as security instead of in payment of the original debt. *Peacock v. Purcell*, *supra*; *Betterton v. Roope*, *supra*; *Haines v. Pearce*, 41 Md. 221; *Lawrence v. McCalmont*, 2 How. 426; *Lee v. Baldwin*, 10 Ga. 208; *Roberts v. Thompson*, 14 Ohio, 1; *Hamilton v. Cunningham*, 2 Brock. 350.

<sup>1</sup> *Kephart v. Butcher*, 17 Iowa, 240; *Gallagher's Exrs. v. Roberts*, 2 Wash. C. C. 191; 2 Am. Lead Cas. 259, 260. See *Brooks v. Elgin*, 6 Gill, 254; *Hamilton v. Cunningham*, 2 Brock. 350; *Cook v. Buck*, 10 Hump. 412.

<sup>2</sup> *Story on Bills*, § 109; *Story on Notes*, § 117; *Dayton v. Trull*, 23 Wend. 345; *Tobey v. Barber*, 5 Johns. 68. The burden of proof is on the defendant to show the laches and the damage flowing from the same. *Bishop v. Rowe*, 3 M. & Sel. 362; *Goodwin v. Coates*, 1 M. & R. 221.

bank-bill, etc., as the case may be. What he received was something else, viz.: a piece of worthless paper.<sup>1</sup> Whether the counterfeit bill must be returned before a second payment can be demanded is somewhat doubtful. According to some of the authorities, it is sufficient if the counterfeit bill is tendered back at the trial, if it is at all necessary to return it.<sup>2</sup> But the weight of authority seems to require that the counterfeit bill must be returned or the debtor notified within a reasonable time, in order to demand a second payment.<sup>3</sup>

If an agent innocently or knowingly receives payment in counterfeit bills, he cannot relieve himself of liability to his principal by tendering him the counterfeit bills. He must make payment in genuine bills.<sup>4</sup>

If the bank-bills are genuine, but have become worthless or depreciated in value in consequence of the insolvency of the bank or other body corporate which issued them, it is doubtful whether the transfer and receipt of them in good faith would operate as an absolute payment. Some of the authorities maintain that the depreciated value of the bills would have no effect on the payment made with them, if the transaction was conducted in good faith by both parties, the creditor having got what he had agreed to take in payment of his claim.<sup>5</sup> But the weight of authority is against

<sup>1</sup> *Markle v. Hatfield*, 2 Johns. 455; *Eagle Bank v. Smith*, 5 Conn. 71; *Goodrich v. Tracy*, 43 Vt. 314; *Emerine v. O'Brien*, 36 Ohio St. 496; *Ritter v. Singmaster*, 73 Pa. St. 400; *Ramsdale v. Horton*, 3 Pa. St. 330; *Baker v. Bonestell*, 2 Hilt. 397; *Hargrave v. Dusenberry*, 2 Hawks, 326; *Young v. Adams*, 6 Mass. 182; *Semmers v. Wilson*, 5 Cranch C. C. 285.

<sup>2</sup> *Brewster v. Burnett*, 125 Mass. 68; *Kent v. Bornstein*, 12 Allen, 342.

<sup>3</sup> *Atwood v. Cornwall*, 28 Mich. 342; *Pindall v. Northwestern Bank*, 7 Leigh, 617; *Thomas v. Todd*, 6 Hill, 340; *Kenny v. First Nat. Bank*, 50 Barb. 114; *Crucier v. Pennock*, 14 S. & R. Simms v. Clarke, 11 Ill. 137; *Wingate v. Neidlinger*, 50 Ind. 526; *Samuels v. King*, 50 Ind. 527. It is a question for the jury, what is a reasonable time. *Burrill v. Watertown Bank*, 51 Barb. 165.

<sup>4</sup> *United States v. Morgan*, 11 How. 154.

<sup>5</sup> *Young v. Adams*, 6 Mass. 185; *Lowrey v. Murrell*, 2 Port. 280;

this view, probably, because the courts consider it more likely that the passing of the depreciated bills was attended with bad faith.<sup>1</sup>

§ 150. **Payment in specific articles.**— Sometimes the contract calls for the payment of the price in something else than money or currency, in other words, in some other goods. But this transaction is to be distinguished from an exchange of goods, inasmuch as the subject-matter of the sale is sold for a price, but the price is to be paid in other goods; whereas, in an exchange, one piece or lot of goods is transferred in consideration of the receipt of another, and there is no stipulation of a price. Where the contract calls for the payment of the price in goods, the goods must be tendered in strict accordance with the terms of the contract, in order that their delivery may constitute a payment of the price. If the contract is broken by a failure of the buyer to deliver the stipulated articles in payment of the price, the vendor does not have to sue for their delivery, but for goods sold and delivered and recover the price in money, as if the original transaction had been a sale for cash.<sup>2</sup> And it is doubtful whether the vendor could recover anything else than the price and the interest thereon. Some of the authorities maintain that he cannot,<sup>3</sup> while others hold that he may

*Ware v. Street*, 2 Head, 609; *Corbit v. Bank of Smyrna*, 2 Harr. 235; *Edmunds v. Digges*, 1 Gratt. 359; *Scruggs v. Gass*, 8 Yerg. 175; *Bayard v. Shunk*, 1 Watts & S. 92.

<sup>1</sup> *Lightbody v. Ontario Bank*, 11 Wend. 9; 13 Wend. 101; *Benedict v. Field*, 4 Duer, 162; *Fogg v. Sawyer*, 9 N. H. 365; *Harley v. Thornton*, 2 Hill (S. C.), 509; *Westfall v. Braley*, 10 Ohio St. 188; *Magee v. Carmack*, 13 Ill. 239; *Aldrich v. Jackson*, 5 R. I. 218; *Honore v. Colmesnil*, 1 J. J. Marsh. 523; *Harris v. Hanover Nat. Bank*, 15 Fed. Rep. 786; *Roberts v. Fisher*, 43 N. Y. 159; *Frontier Bank v. Morse*, 22 Me. 88; *Townsend v. Bank of Racine*, 7 Wis. 185; *Wainright v. Webster*, 11 Vt. 576.

<sup>2</sup> *Ferry v. Smith*, 23 Vt. 301; *Stone v. Nichols*, 43 Mich. 16; *Roberts v. Beatty*, 2 Pen. & Watts, 63; *Church v. Feterow*, 2 Pen. & Watts, 301.

<sup>3</sup> *Heywood v. Heywood*, 42 Me. 229; *Smith v. Smith*, 2 Johns. 253;

recover for the value of the goods at the time and place of delivery.<sup>1</sup>

§ 151. **Payment by set-off.**—Inasmuch as a sale ordinarily implies that the goods shall be paid for in money, the buyer cannot propose, against the consent of the seller, to pay the price by a set-off of a claim or debt which he, the buyer, holds against the seller. And it has been held that if the buyer attempts such a set-off, and refuses to make payment of the price, it is a fraud on the seller, and he may reclaim the goods.<sup>2</sup>

§ 152. **Appropriation of payments.**—When one is indebted to another on two or more accounts or instruments of indebtedness, and payment is made in amounts not sufficient to satisfy all, it is often difficult to determine in detail to which debt the payment should be appropriated. But the following general rules may be deduced from the adjudications upon the subject:—

1. When the payment is voluntary, and is not made under the stress of legal process, the debtor has the right to make the appropriation to whatever item or account he pleases,<sup>3</sup> even to the prejudice of one who is security for one of the debts.<sup>4</sup> But an application by the debtor is

*Pinney v. Gleason*, 5 Wend. 393; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Cleveland R. R. Co. v. Kelley*, 5 Ohio St. 180; *Brooks v. Hubbard*, 3 Conn. 58.

<sup>1</sup> *Mason v. Phillips*, Add. 346; *Clark v. Pinney*, 7 Cow. 681; *Edgar v. Boies*, 11 Serg. & R. 445; dissenting opinion of Rice, J., in *Heywood v. Heywood*, 42 Me. 235.

<sup>2</sup> *Wabash Elevator Co. v. First Nat. Bank*, 23 Ohio St. 311. See *Allen v. Hartfield*, 76 Ill. 358.

<sup>3</sup> *Taylor v. Sandford*, 7 Wheat. 13; *United States v. January*, 7 Cranch, 572; *Miller v. Trevillian*, 2 Rob. 1; *Hooper v. Keay*, 1 Q. B. Div. 178; *Howard v. McCall*, 21 Gratt. 205; *Lingle v. Cook*, 32 Gratt. 272; *Whittaker v. Pope*, 48 Ga. 13; *Simson v. Ingham*, 2 B. & C. 72; *Harding v. Wormley*, 3 Baxt. 578; *Clarke v. Scott*, 45 Cal. 86; *Sprinkle v. Martin*, 72 N. C. 92.

<sup>4</sup> *Goddard v. Cox*, 2 Stra. 1194; *Kirby v. Duke of Marlborough*, 2 Maule & S. 18; *Chitty on Bills*, [\*402], 454.

final. Once the payment has been applied by the creditor in compliance with the debtor's directions, the debtor cannot make a different application without the consent of the creditor.<sup>1</sup> Nor would the courts make any other application for him.<sup>2</sup> As between the debtor and creditor, the debtor has until the bringing of the suit, in which to make the appropriation; but as to third parties, he must make the appropriation within a reasonable time.<sup>3</sup>

2. If the debtor does not make the appropriation, the creditor may apply it as he pleases.<sup>4</sup> But it has been held, with much show of reason for it, that if the debtor has, for any reason, not had an opportunity to make the appropriation, the creditor cannot exercise the right of appropriation.<sup>5</sup> It is likewise denied to the creditor to make the

<sup>1</sup> *Richardson v. Woodbury*, 12 Cush. 279; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Hill v. Sutherland*, 1 Wash. (Va.) 128; *Hubbell v. Flint*, 15 Gray, 550; *Plummer v. Erskine*, 58 Me. 59; *Phillips v. Moses*, 65 Me. 70; *Brown v. Burns*, 67 Me. 535; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 269; *Caldwell v. Wentworth*, 14 N. H. 431.

<sup>2</sup> *Treadwell v. Moore*, 34 Me. 112; *Feldman v. Gamble*, 26 N. J. Eq. 494.

<sup>3</sup> *Phillpott v. Jones*, 2 A. E. 41; *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *United States v. Kirkpatrick*, 9 Wheat. 720; *Johnson v. Johnson*, 30 Ga. 857; *Pattison v. Hull*, 9 Cow. 747. But see *National Bank v. Bigler*, 83 N. Y. 51, where it is held that the debtor's right of appropriation must be exercised at the time of making payment, or at least before the creditor has appropriated it. See also *Plummer v. Erskine*, 58 Me. 61; *Moss v. Adams*, 4 Ired. Eq. 42; *Gaston v. Birney*, 11 Ohio St. 506; *Brice v. Hamilton*, 12 S. C. 37.

<sup>4</sup> *Woods v. Sherman*, 71 Pa. St. 100; *Allen v. Culver*, 8 Den. 284; *Harding v. Wormley*, 8 Baxt. 578; *Smith v. Screven*, 1 McCord, 368; *Chapman v. Commissioners*, 25 Gratt. 721; *Lingle v. Cook*, 32 Gratt. 272; *Bennett v. Wilder*, 67 Ill. 327; *Bean v. Brown*, 54 N. H. 395; *Pattison v. Hull*, 9 Cow. 747. The creditor cannot change the appropriation after having once made it. *Mayor of Alexandria v. Patten*, 4 Cranch, 317; *Bank of N. A. v. Meredith*, 2 Wash. C. C. 47; *Hill v. Southerland*, 1 Wash. (Va.) 128; *White v. Trumbull*, 3 Green (N. J.), 314; *Tooke v. Bonds*, 29 Tex. 419; *Harding v. Wormley*, 8 Baxt. 578; *McMaster v. Merrick*, 41 Mich. 505; *Seymour v. Marvin*, 11 Barb. 80. It is otherwise, if the debtor has not been notified. *Hankey v. Hunter*, Peake Ad. Cas. 107.

<sup>5</sup> 2 *Parsons on Contracts*, [\*634], 764; *Waller v. Lacy*, Man. & G. 54;



appropriation to a debt, which is not yet due, if there are debts already due;<sup>1</sup> so, also, to a debt whose validity has been denied by the debtor.<sup>2</sup> The right of appropriation is otherwise unconditional, and in the exercise of the right the creditor can apply the payment to a debt barred by the statute of limitations, even against the will of the debtor. But such an appropriation will not take the debt out of the statute as to the balance.<sup>3</sup> But the creditor cannot apply the payment to an illegal debt, *i.e.*, one which is absolutely void in law.<sup>4</sup> The creditor can apply the payment, to suit himself, to the individual debt of the payor, or to his joint debt,<sup>5</sup> or to an unsecured debt in preference to one that is secured.<sup>6</sup> So, likewise, he could apply it to a debt that cannot be enforced by reason of the statute of frauds.<sup>7</sup>

But in order that the debtor may make an appropriation, it is not necessary for him to make an express declaration

*Blackstone Bank v. Hill*, 10 Pick. 129; *Bridenbecker v. Lowell*, 82 Barb. 9; *Cowperthwaite v. Sheffield*, 8 N. Y. 243; *Jones v. Benedict*, 88 N. Y. 86; *Jones v. Williams*, 89 Wis. 800.

<sup>1</sup> *Bohe v. Stickney*, 86 Ala. 482.

<sup>2</sup> *Taylor v. Sandford*, 7 Wheat. 13. But otherwise, if the disputed debt is valid. *Lee v. Early*, 44 Md. 80.

<sup>3</sup> *Mills v. Foulke*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 De G. & M. & G. 474; *Pond v. Williams*, 7 Gray, 630; *Williams v. Griffith*, 5 M. & W. 300; *Logan v. Mason*, 6 Watts & S. 9; *Ayer v. Hawkins*, 19 Vt. 26; *Livermore v. Rand*, 26 N. H. 85; *Watt v. Hoch*, 25 Pa. St. 411; *Phillips v. Moses*, 65 Me. 70; *Brown v. Burns*, 67 Me. 535.

<sup>4</sup> *Caldwell v. Wentworth*, 14 N. H. 431; *Wright v. Laing*, 3 B. & C. 165; *Arnold v. The Mayor, etc., of Poole*, 4 Man. & G. 860; *Ex parte Randleson*, 2 Deacon & Ch. 534; *Kidder v. Norris*, 18 N. H. 532; *Bancroft v. Dumas*, 21 Vt. 456; *Rohan v. Hanson*, 11 Cush. 44; *Brown v. Lacy*, 83 Ind. 436; *Greene v. Tyler*, 39 Pa. St. 361; *Pickett v. Merchants' Bank*, 82 Ark. 346; *Adams v. Mahuken*, 41 N. J. Eq. 332. But see *contra* *Philpott v. Jones*, 2 A. & E. 41; *Cruickshanks v. Rose*, 1 Moody & R. 100; *Treadwell v. Moore*, 34 Me. 112.

<sup>5</sup> *Upham v. Le Favor*, 11 Met. 174.

<sup>6</sup> *Van Rensselaer v. Roberts*, 5 Denio, 470.

<sup>7</sup> *Haynes v. Nice*, 100 Mass. 327; *Murphy v. Webber*, 61 Me. 478; *McLendas v. Frost*, 57 Ga. 448.

to the creditor. Any facts or circumstances which show an intention to make an appropriation will be binding upon the creditor, and deprive him of the right to make the appropriation,<sup>1</sup> even though the creditor is unwilling to accede to the debtor's wishes or receives payment with a different intention.<sup>2</sup>

3. When neither debtor nor creditor has made the appropriation, it will be applied by law, in the manner which best conforms to principles of equity, and to the probable intention of the parties. Where principal and interest are due, the payment will be applied first to the interest and then to the principal.<sup>3</sup>

Everything else being equal, the law will apply the payment to the debts of longest standing.<sup>4</sup> Ordinarily, the payment will be applied to those debts which, on account of bearing interest, or of some penalty or criminal liability being attached to it, is most burdensome to the debtor.<sup>5</sup> But it will not be applied to the debt which is secured, in preference to the unsecured debt. In this case the best interest of the creditor is consulted, and payment is applied

<sup>1</sup> *Pickett v. Memphis Bank*, 32 Ark. 346; *Tayloe v. Sandiford*, 7 Wheat. 14; *Robert v. Garnie*, 3 Calnes, 14; *Scott v. Fisher*, 4 T. B. Mon. 387; *Newmarch v. Clay*, 14 East, 239; *Shaw v. Picton*, 4 B. & C. 715; *Mitchell v. Dall*, 2 Harr. & G. 159; 4 Gill & J. 361; *Fowke v. Bowie*, 4 Harr. & J. 566; *West Branch Bank v. Moorehead*, 5 Watts & S. 542; *Stone v. Seymour*, 15 Wend. 19.

<sup>2</sup> *Reed v. Boardman*, 20 Pick. 441; *Wetherell v. Joy*, 40 Me. 325.

<sup>3</sup> *Lash v. Edgerton*, 13 Minn. 210. Held otherwise, if payment is made before maturity. *Starr v. Richmond*, 30 Ill. 276. If the interest also bears interest, then the payment must be applied to the interest on interest, then to the primary interest, and finally, to the principal. *Auketel v. Converse*, 17 Ohio St. 11.

<sup>4</sup> *United States v. Kirkpatrick*, 9 Wheat. 720; *Smith v. Loyd*, 11 Leigh, 512; *Horne v. Planters' Bank*, 32 Ga. 1; *Mills v. Fowlkes*, 5 Bing. N. C. 461; *Bobe v. Stickney*, 36 Ala. 482; *Wendt v. Ross*, 33 Cal. 650.

<sup>5</sup> *Meggott v. Mills*, 1 Ld. Raym. 286; *Spiller v. Creditors*, 16 La. Ann. 292; *Wright v. Laing*, 3 B. & C. 165; *Peters v. Anderson*, 5 Taunt. 596. But see *Mills v. Fowlkes*, 5 Bing. N. C. 455; 7 Scott, 444; *Stone v. Seymour*, 15 Wend. 29.

to the unsecured debt.<sup>1</sup> But the general rule is that the law favors the surety, and will apply the payment to the debt on which the surety is liable,<sup>2</sup> that is, of course, if the creditor has not made the application. The creditor has the right, if he chooses, to apply the payment to the unsecured debt, against the interest of the surety.<sup>3</sup> The court will not apply it to a debt barred by the statute of limitations, in preference to one that is not barred.<sup>4</sup> But if one of two or more debts falls under the bar of the statute after payment and before its appropriation, the court will apply it to the debt that has thus been barred.<sup>5</sup> And where the sum paid equals the amount due on one item, it will be applied to that item.<sup>6</sup>

If one is indebted, individually and as a partner, to the same person, a payment will be applied to the individual or partnership debt, according as the money paid belongs to the individual partner<sup>7</sup> or to the firm.<sup>8</sup> If it is doubtful whose money is paid, in the case of individual and joint liabilities, the creditor may apply it to either debt.<sup>9</sup> And

<sup>1</sup> *Lash v. Edgerton*, 18 Minn. 210; *Foster v. McGraw*, 64 Pa. St. 464; *Baine v. Williams*, 10 Sm. & M. 113; *Standford Bank v. Benedict*, 15 Conn. 437; *Cole v. Withers*, 83 Gratt. 204; *Moss v. Adams*, 4 Ired. Eq. 42; *Field v. Holland*, 6 Cranch, 8; *Burch v. Tebbutt*, 2 Stark. 74; *Trullinger v. Kofold*, 7 Ore. 228; *Anon.*, 8 Mod. 235; *Chitty v. Nash*, 2 Dowl. 511; *Planters' Bank v. Stockman*, 1 Freem. Ch. 502; *Hilton v. Burley*, 2 N. H. 193; *Jones v. Kilgore*, 2 Rich. Eq. 64; *Moss v. Adams*, 4 Ired. Eq. 42; *Ramsour v. Thomas*, 10 Ired. 165. See *contra* *Pattison v. Hall*, 9 Cow. 747. See also *Dorsey v. Gassaway*, 2 Harr. & J. 402; *Guinn v. Whittaker*, 1 Harr. & J. 754; *Robinson v. Doolittle*, 12 Vt. 246.

<sup>2</sup> *Marryatts v. White*, 2 Stark. 101. See *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Pierce v. Knight*, 31 Vt. 701; *Hausen v. Rounsavell*, 74 Ill. 238; *Fridley v. Bowen*, 103 Ill. 633.

<sup>3</sup> *Harding v. Tift*, 75 N. Y. 461; *Hanford v. Robertson*, 47 Mich. 100.

<sup>4</sup> *Nash v. Hodgson*, 6 De G. M. & G. 474.

<sup>5</sup> *Robinson's Admr. v. Allison*, 36 Ala. 525.

<sup>6</sup> *Robert v. Garnie*, 3 Caines, 14.

<sup>7</sup> *Fairchild v. Holly*, 10 Conn. 175.

<sup>8</sup> *Thompson v. Brown*, Moody & M. 40.

<sup>9</sup> *Van Rensselaer's Exrs. v. Roberts*, 5 Den. 570; *Baker v. Stackpole*, 9 Cow. 420.

where there is a change in the *personnel* of the firm in the midst of a series of commercial transactions with a particular creditor, the court should apply a payment to the debts of the old firm.<sup>1</sup>

§ 153. **Payment on Sunday.** — The Sunday laws do not prevent a debt from being liquidated by a payment on Sunday if the creditor retains the money.<sup>2</sup> But if it be only a partial payment of a debt which has been barred by the statute of limitations the part payment will not have the effect of avoiding the statute, on the ground that the avoidance of the statute in such a case rests upon the implication of the debtor's promise to pay the balance, and since any express promise made on Sunday would be void, this implied promise would likewise be void.<sup>3</sup>

§ 154. **Payment by mail.** — As a general proposition, if money is sent by mail in payment of a debt, without any authority from the creditor and without sanction of any general custom and usage, the money is sent at the risk of the debtor, and in order that it may constitute a discharge of the debt, the money must be received by the creditor.<sup>4</sup> But if the creditor, expressly or by implication, authorizes the transmission of the money by mail, he makes the mail carrier his agent for the receipt of the money in payment of his claim, and the debt is held to be discharged, although the money never reaches the creditor and is lost in

<sup>1</sup> *Simon v. Ingham*, 5 B. & C. 72; 3 Dowl. & R. 249; *Hooper v. Keay*, 2 Q. B. Div. 178.

<sup>2</sup> *Johnson v. Willis*, 7 Gray, 164.

<sup>3</sup> *Clapp v. Hale*, 112 Mass. 868; *Dennis v. Sharman*, 31 Ga. 607; *Baumgardner v. Taylor*, 28 Ala. 687. But see *Thomas v. Hunter*, 29 Md. 412; *Ayres v. Bane*, 30 Iowa, 518.

<sup>4</sup> *Crane v. Pratt*, 12 Gray, 348; *Buell v. Chapin*, 99 Mass. 596; *Holland v. Lyns*, 56 Ga. 56; *Williams v. Carpenter*, 36 Ala. 9; *First Nat. Bank v. McManigle*, 69 Pa. St. 156.

the mail.<sup>1</sup> And it has been held that the authority to transmit money by mail so as to throw the risk on the creditor, would be implied from a request by mail "to remit to us as soon as received."<sup>2</sup>

Proof that a letter, containing the money and properly addressed to the creditor, had been deposited in the post-office, is *prima facie* evidence of payment, at least, to be rebutted by proof that it has not been received by the creditor, wherever the money is transmitted at the risk of the debtor.<sup>4</sup>

<sup>1</sup> Wakefield v. Lithgow, 3 Mass. 249; Morgan v. Richardson, 18 Allen, 410; Garney v. Howe, 9 Gray, 404; Palmer v. Phoenix Mut. Ins. Co., 84 N. Y. 63.

<sup>2</sup> Townsend v. Henry, 9 Rich. L. 818.

<sup>3</sup> Huntley v. Whittier, 105 Mass. 391; Waydell v. Velie, 1 Bradf. 277.

## CHAPTER XIII.

### FRAUDULENT SALES.

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§ 157. Fraud defined — Its component parts. — So far as it is possible or advisable to define fraud, it may be said to consist of any intentional or wrongful deception of

another.<sup>1</sup> The forms of fraud are, however, infinite; and, partly because it is for this reason difficult or impossible, and partly, in order to keep the definition elastic enough to cover and include every possible form of fraud, the courts have not been disposed to lay down any precise definition, or to present any exact statement of its nature or proof.<sup>2</sup> Suffice it to say, that fraud is a question of fact for the jury, to be determined by them from the facts and circumstances of each particular case.<sup>3</sup>

The general requisites of fraud are, 1. A misrepresentation or concealment of a material fact. 2. An intention to deceive, or negligence in uttering falsehoods, with the intention of influencing therewith the actions of others. 3. The success of the deceit in influencing the action of the other party.

§ 158. **A material misrepresentation of fact.** — In determining the character of this requisite, it must first be observed, that there must be a misrepresentation of *fact*. Legal fraud cannot be predicated, as a general rule, on a misrepresentation of the law. Ignorance of the law excuses no one, and since every one is presumed to know the law, it would be a contradiction to hold that the party, to whom the misrepresentation was made, was misled thereby.<sup>4</sup> But inasmuch as one is not expected to know foreign laws and

<sup>1</sup> See Benjamin on Sales, § 428; Story on Sales, § 158; *Dambmann v. Schulting*, 75 N. Y. 55; *Smith v. Smith*, 21 Pa. St. 367; *Rodman v. Thalheller*, 75 Pa. St. 232.

<sup>2</sup> *Stewart v. Emerson*, 52 N. H. 313; 2 Pars. Contr. 769; Story Eq. Jur., § 186; Story on Sales, § 158; *Lawley v. Hooper*, 3 Atk. 279.

<sup>3</sup> *Hadley v. Clinton*, 13 Ohio St. 502; *Burr v. Clement*, 9 Col. 1; *Second Nat. Bank v. Dix*, 101 N. Y. 684.

<sup>4</sup> *Fish v. Cleland*, 33 Ill. 288; *Dalley v. Jassup*, 72 Mo. 144; *Clem v. New Eastle, &c.*, 9 Ind. 498; *Rose v. Hurley*, 39 Ind. 77, 82; *Clodfelter v. Hulett*, 72 Ind. 137, 143; *Upton v. Trebilcock*, 91 U. S. 45, 50; *Rawson v. Harger*, 48 Iowa, 269; *Dillman v. Nadleffer*, 119 Ill. 567; *Insurance Co. v. Reed*, 33 Ohio St. 288. See *Tabor v. Mich. Mut. Ins. Co.*, 40 Mich. 331.

private acts, any misrepresentation as to them would be fraudulent.<sup>1</sup> In the second place, the fact to which the representation refers must be one which is not equally within the observation of both parties. If it is a matter open to the observation of every one, or which can be ascertained by the exercise of reasonable diligence in inquiry, one is guilty of negligence in relying upon the representations of the other party, and the latter cannot be charged with fraud, unless the parties have agreed that the sale shall be made upon the representation of one of them, when the representations become in effect warranties. As a general rule, such misrepresentations do not constitute a legal fraud.<sup>2</sup>

In the third place, the misrepresentation must be of a material fact, *i. e.*, it must have a material bearing upon the transaction in hand. If the representations do not concern the parties to the transaction as such, or only in an immaterial degree, they will not taint the transaction with fraud.<sup>3</sup> But a distinction is made by the authorities be-

<sup>1</sup> *King v. Doolittle*, 1 Head (Tenn.), 17.

<sup>2</sup> *Mooney v. Miller*, 102 Mass. 220; *James v. Lichfield*, L. R. 9 Eq. 51; *Crooks v. Davis*, 6 Grant (Ont.), 317; *McRae v. Froom*, 17 Grant (Ont.) 357; *Coates v. Bacon*, 21 Grant (Ont.) 21; *Newell v. Horn*, 49 N. H. 422; *Turman v. Tufts*, 8 Jones & S. 284; *Sparman v. Keim*, 12 Jones & S. 163; *Long v. Warren*, 68 N. Y. 426; *Hess v. Young*, 59 Ind. 379; *Hustin v. McCloskey*, 76 Ind. 38; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Crown v. Cuningher*, 66 Ala. 590; *Atwood v. Small*, 6 Clark & F. 238; *Brown v. Castides*, 11 Cush. 348; *Prescott v. Wright*, 4 Gray, 461; *Cooper v. Lovering*, 106 Mass. 76, 79; *Dickinson v. Lee*, 106 Mass. 557; *Poland v. Brownell*, 131 Mass. 138; *Chamberlain v. Rankin*, 49 Vt. 133; *Randall v. Farnum*, 52 Vt. 539.

<sup>3</sup> *Jennings v. Broughton*, 5 De Gex, M. & G. 126; *Nolan v. Cain*, 3 Allen, 263; *Brown v. Tuttle*, 66 Barb. 169; *Mason v. Raplee*, 66 Barb. 180; *Swikehard v. Russell*, 66 Barb. 560; *Bower v. Ferm*, 90 Pa. St. 359; *Hall v. Johnson*, 41 Mich. 286; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Noel v. Horton*, 50 Iowa, 687; *Frenzel v. Miller*, 37 Ind. 1, 17; *Miller v. Young*, 33 Ill. 355; *Hanna v. Sayburn*, 84 Ill. 533; *Higgins v. Bicknell*, 82 Ill. 502; *Race v. Weston*, 86 Ill. 91; *Melendy v. Keen*, 89 Ill. 395; *Smith v. Brittenham*, 98 Ill. 138; *Bradley v. Luce*, 99 Ill. 234; *Schwabacker v. Riddle*, 99 Ill. 343; *Mather v. Robinson*, 47 Iowa, 403; *Dawson v. Graham*, 48 Iowa, 378; *Noel v. Horton*, 50 Iowa, 687; *Meyers v. Funk*,



tween mere expressions of opinion of the parties concerning the value or qualifications of the subject of sale and positive representations concerning them, holding that the former are common and well understood attempts by appreciation and depreciation of the goods to make a good bargain, and which do not mislead the more or less experienced tradesmen, and hence do not constitute a legal fraud, although the other party should happen to be misled.<sup>1</sup> There is, however, no logical distinction between the two, where the intention is to deceive; and, if a distinction is at all possible, it must rest upon the variance in the habits of society, the one species of deception being common and

56 Iowa, 52; *Winter v. Baudel*, 30 Ark. 362; *Cooper v. Merritt*, 30 Ark. 586; *Lapp v. Firstbrook*, 24 Up. Can. C. P. 239; *Sanders v. Lyon*, 2 McArthur, 452; *Smith v. Richards*, 13 Pet. 26; *Gordon v. Butler*, 105 U. S. 553; *Teague v. Irwin*, 127 Mass. 217; *Blair v. Laffin*, 127 Mass. 518; *Com. v. Jackson*, 132 Mass. 16; *Smith v. Countryman*, 30 N. Y. 655; *Rice v. Manley*, 66 N. Y. 82; *Duffany v. Ferguson*, 66 N. Y. 482; *Miller v. Barber*, 66 N. Y. 558; *Wilcox v. Henderson*, 64 Ala. 535; *Welshbillig v. Dienhart*, 65 Ind. 94; *Jones v. Hathaway*, 77 Ind. 14; *Elsass v. Moore's Hill Inst.* 77 Ind. 72; *Stevens v. Rainwater*, 4 Mo. App. 292.

<sup>1</sup> *Homer v. Perkins*, 124 Mass. 431; *Somers v. Richards*, 46 Vt. 170; *Van Epps v. Harrison*, 5 Hill, 68; *Buschman v. Cold*, 52 Md. 202, 207; *Sledge v. Scott*, 56 Ala. 202; *Merwin v. Arbuckle*, 81 Ill. 501; *Schramm v. O'Conner*, 98 Ill. 539; *Dawson v. Graham*, 48 Iowa, 378; *Stevens v. Rainwater*, 4 Mo. App. 292; *Samson v. Lord*, 13 How. 198; *Gordon v. Butler*, 105 U. S. 553; *First Nat. Bank v. Yocum*, 11 Neb. 328; *People v. Jacobs*, 35 Mich. 36; *Kennedy v. Richardson*, 70 Ind. 534; *Cagney v. Cuson*, 77 Ind. 497; *Wilcox v. Henderson*, 6 Ala. 535, 541; *Sledge v. Scott*, 56 Ala. 202; *State v. Phifer*, 65 N. C. 321, 326; *Uhler v. Semple*, 20 N. J. Eq. 288; *Long v. Woodman*, 58 Me. 49; *Holbrook v. Conner*, 60 Me. 578; *Medbury v. Watson*, 6 Met. 246, 259; *Vesey v. Dalton*, 3 Allen, 380; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 79; *Yeagin v. Irwin*, 127 Mass. 217; *Poland v. Brownell*, 131 Mass. 138. In *Graffenstein v. Epstein*, 23 Kans. 443, the court says: "A misrepresentation as to the market value of an article of general commerce, made falsely and fraudulently by one party to induce a sale, and relied upon by the other, will not avoid a contract therefor when there are no circumstances making it the special duty of the one party to communicate the knowledge he possesses, and none giving him the peculiar means of ascertaining such market price."

more or less condoned by commercial custom, while the other is less common and is stoutly condemned by public opinion.<sup>1</sup>

§ 159. **When concealment is fraudulent.**—As a general rule, the law does not require the parties to a contract to supply each other with information concerning the subject-matter of the contract. *Caveat emptor* is the cardinal rule of the law of sales. The vendor and vendee are said to treat with each other at arm's length, and unless the parties have mutually agreed to a modification of the ordinary relation existing between them, and placed themselves under obligation to give information, it is no fraud for one of the parties to conceal any material fact from the other, provided he does nothing to mislead the other party, or to prevent or render more difficult his acquisition of the knowledge.<sup>2</sup> It is only when the one party merely keeps silent, that he does not commit any legal fraud upon the other. If the silence amounts to a positive concealment of a material fact, as where there are attempts to draw the attention of the other party from that fact, or to cover it up from view, then the silence becomes equivalent to a misrepresentation, and gives the taint of fraud to the transaction.<sup>3</sup> It would also be a fraud, where one, in response to an inquiry or voluntarily, made a statement, which was true, as far as it went, but which would be placed in a different light, if a suppressed fact had been

<sup>1</sup> See Tiedeman's "Unwritten Constitution of the United States," p. 10.

<sup>2</sup> *Laidlow v Organ*, 2 Wheat. 178; *Kintzing v. McElrath*, 5 Pa. St. 467; *Butler's Appeal*, 26 Pa. St. 63, 66; *Blydenburgh v. Welch*, Baldw. (U S.) 331; *Perry v. Johnston*, 59 Ala. 648; *People's Bank v. Bogert*, 81 N. Y. 101, 108.

<sup>3</sup> *Matthews v. Bliss*, 22 Pick. 48, 52; *Smith v. Countryman*, 30 N. Y. 655, 681; *Roseman v. Conovan*, 43 Cal. 118; *Jackson v. Collins*, 39 Mich. 557, 661; *Savage v. Stevens*, 126 Mass. 207. But see *Graffenstein v. Epstein*, 23 Kans. 443.

stated. In such cases, the fact stated is made to produce a false impression, in consequence of the concealment of another material fact.<sup>1</sup> It is likewise a fraud for one to suppress a fact, if he is under an obligation to disclose it, on account of being in a fiduciary relation to the other party.<sup>2</sup>

§ 160. **Intention to deceive — Negligence in the statement of falsehoods.** — The intention to deceive is a necessary element of actual fraud. An innocent misrepresentation is not a fraud, however much damage it may have caused,<sup>3</sup> although such a misrepresentation might cause a mistake of fact, or failure of consideration which would

<sup>1</sup> *Peck v. Gurney*, L. R. 6 H. L. 408; *Smith v. Chadwick*, L. R. 20 Ch. D. 58; *Phillips v. Foxall*, L. R. 7 Q. B. 679; *Lee v. Jones*, 17 C. B. (N. S.) 506; *Arkwright v. Newbold*, L. R. 17 Ch. D. 817; *Devoe v. Brandt*, 53 N. Y. 462. See also *Brown v. Montgomery*, 20 N. Y. 287; *Armstrong v. Huffstuttler*, 19 Ala. 51; *Turner v. Huggins*, 14 Ark. 21; *Pease v. McClelland*, 2 Bond, 42; *Marsh v. Webber*, 13 Minn. 109; *Stevens v. Orman*, 10 Fla. 9; *Hanson v. Edgerly*, 29 N. H. 343.

<sup>2</sup> *Tate v. Williamson*, L. R. 2 Ch. 55; *Macpherson v. Watt*, L. R. 3 App. Cas. 254; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 73; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218; *Emma Silver Mfg. Co. v. Lewis*, L. R. 4 C. P. D. 396.

<sup>3</sup> *Cowley v. Smith*, 46 N. J. L. 380; *Weeks v. Burton*, 7 Vt. 67; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Castles*, 11 Cu h. 348-351; *Klug v. Eagle Mills*, 10 Allen, 548; *French v. Vining*, 102 Mass. 132; *Fisher v. Mellen*, 108 Mass. 503; *Cooper v. Lovering*, 106 Mass. 78; *Beach v. Bemis*, 107 Mass. 498; *Boyd v. Browne*, 6 Barr. 310; *Kimball v. Moreland*, 559a. 164; *Josselyn v. Edwards*, 57 Ind. 212; *Seller v. Clelland*, 2 Col. 532; *French v. Skead*, 24 Grant's Ch. (Ont.) 179; *Russell v. Clark*, 7 Cranch, 69; *Righter v. Roller*, 31 Ark. 170; *Tone v. Wilson*, 62 Ill. 529; *Merwin v. Arbuckle*, 81 Ill. 501; *St. Louis, &c., R. Co. v. Rice*, 85 Ill. 406; *Wharf v. Roberts*, 88 Ill. 426; *Dilworth v. Bradner*, 85 Pa. St. 238; *Duff v. Williams*, 85 Pa. St. 490; *Frisbie v. Fitzsimmons*, 3 Hun, 674; *Marshall v. Fowler*, 7 Hun, 237; *Wetscott v. Ainsworth*, 9 Hun, 53; *Morehouse v. Yeager*, 9 Jones & S. 135; *Barrett v. Barrett*, 66 Barb. 205; *Babcock v. Libbey*, 53 How. Pr. 255; *Young v. Covell*, 8 Johns. 25; *Stilt v. Little*, 63 N. Y. 427; *Tryon v. Whitmarsh*, 1 Met. 1; *Page v. Bent*, 2 Met. 371; *Stone v. Denny*, 4 Met. 151, 153; *Pettigrew v. Chellis*, 4 N. H. 95; *Hanson v. Edgerly*, 29 N. H. 343; *Page v. Parker*, 40 N. H. 47, 69; *McDonald v. Trafton*, 15 Me. 225.

avoid the contract;<sup>1</sup> or it might constitute a breach of a warranty.<sup>2</sup>

But it is to be observed that there is no ground for the charge of fraud, only when the false statement is made innocently and without blame. While the intent to deceive is a necessary element of actual fraud, yet the reckless statement of what one does not know to be true, for the purpose of influencing the actions of others is reprehensible under the law, and is an offense, akin to actual fraud, which might be called constructive fraud. Under those circumstances, the law conclusively presumes that the utterer of false statements intended to deceive. If, however, one has reasonable grounds for believing his statements to be true, although they are false, he has made an innocent mistake, for which he cannot be held responsible. It is only when he makes statements, which he knows to be false or has no reasonable grounds for believing to be true, that he is guilty of fraud.<sup>3</sup>

**§ 161. Reliance upon representation — Deceit must be successful. —** It is also necessary, to constitute ground

<sup>1</sup> See *ante*, § 85. See also Benjamin on Sales, §§ 420-422, 429, 610; Kennedy v. Panama Mail Co., L. R. 2 Q. B. 580, 587; Crump v. U. S. Mining Co., 7 Gratt. 352; Grim v. Byrd, 32 Gratt. 293, 300; Pendarvis v. Gray, 41 Tex. 326; Lopes v. Robinson, 54 Tex. 510; Allen v. Hart, 72 Ill. 106; Thorne v. Prentis, 83 Ill. 99; Rupp v. Jarrett, 94 Ill. 475, 479; Smith v. Richards, 13 Pet. 26.

<sup>2</sup> See *post*, § 193.

<sup>3</sup> Weir v. Bell, L. R. 3 Ex. D. 238; Mannatt v. Emerson, 27 Me. 308; Page v. Bent, 2 Met. 371; Stone v. Denny, 4 Met. 451; Burgess v. Wilkinson, 13 R. I. 646; Grim v. Byrd, 32 Gratt. 293; Mitchell v. Zimmerman, 4 Tex. 75; Graham v. Mowlin, 54 Ind. 389; Hough v. Richardson, 3 Story, 691; Doggett v. Emerson, 3 Story, 733; Hammond v. Pennock, 61 N. Y. 145; Blackman v. Johnson, 35 Ala. 252; Sledge v. Scott, 56 Ala. 202; Einstein v. Marshall, 58 Ala. 153; Allen v. Hart, 72 Ill. 104; Bower v. Fenn, 90 Pa. St. 359; Rawson v. Harger, 48 Iowa, 269; Clark v. Rolls, 58 Iowa, 201; Parmlee v. Adolph, 28 Ohio St. 10; Ætna Ins. Co. v. Reed, 33 Ohio St. 283; Foard v. McComb, 12 Bush, 723; Gunby v. Sluter, 44 Md. 237; Fisher v. Mellen, 103 Mass. 506; Savage v. Stevens, 12 Mass. 207; Hazard v. Irwin, 18 Pick. 95.

for the charge of fraud, that the deceit should be successful in that the party intended to be influenced actually relied upon the misrepresentation. If the other party did not rely upon the misrepresentation, but was induced by other considerations to make the contract, then he was not deceived, and he could not afterward secure a release from the contract on the ground of fraud in the negotiation, for he was not defrauded. It would, at the most, be only an attempt to defraud, which might be made punishable, as a criminal offense, but could not be made the subject of a civil action.<sup>1</sup> But it seems to be the presumption of law, that if a material misrepresentation is made the other party relied upon it in the execution of the contract; and this presumption must be rebutted in order that the party making the representation may be relieved from liability for fraud.<sup>2</sup>

§ 162. **Damage to party deceived.**—The gist of the charge of fraud is that the plaintiff has been deceived *to his own damage* by the misrepresentation of the defendant. It is not simply deception, but deception *plus* consequential damage. Hence, if the party deceived has suffered no damage, he has no cause of action against the other party.<sup>3</sup>

<sup>1</sup> Gregory v. Schoenell, 55 Ind. 101; 2 Schouler Pers. Prop., § 605; Smith v. Hughes, 6 Q. B. 597.

<sup>2</sup> Holbrook v. Bust, 22 Pick. 546; Redgrave v. Hurd, L. R. 20 ch. D. 1; Fishback v. Miller, 15 Nev. 428. But see Taylor v. Guest, 58 N. Y. 262; Merriam v. Pine City Lumber Co., 23 Minn. 314; Jackson v. Collins, 39 Mich. 557; Sims v. Elland, 57 Miss. 607.

<sup>3</sup> Atwood v. Small, 6 Clark, & F. 448; Smith v. Kay, 7 H. L. Cas. 774; Weaver v. Wallace, 9 N. J. L. 251; Sledge v. Scott, 56 Ala. 206; Neidefer v. Chastain, 71 Ind. 863; Morrison v. Lods, 39 Cal. 385; Pasley v. Freeman, 3 T. R. 51; Vernon v. Keys, 12 East, 637; Phipps v. Buckman, 30 Pa. St. 402; Castleman v. Griffin, 13 Wis. 535; Fisher v. Mellen, 103 Mass. 505; Page v. Bent, 2 Met. 374; Stiles v. White, 11 Met. 856; Milliken v. Thorndike, 103 Mass. 385; Hanson v. Edgerton, 29 N. H. 357; Hart v. Tallmadge, 2 Day (Conn.) 382; Young v. Hall, 4 Ga. 95; Bartlett v. Blaine, 83 Ill. 216; Hughes v. Sloan, 2 Ark. 146; McMaster v. Geddes, 19 Up. Can. Q. B. 216; Hagee v. Grossman, 31 Ind. 223; Weatherford v. Fishback, 8

Thus, it is held to be no fraud to induce a debtor, by false representation, to pay his just debt.<sup>1</sup>

§ 163. Remedies for fraud. — The principal remedy for fraud is the rescission of the contract. The party defrauded has the right on discovery of the fraud to rescind the contract and obtain relief from all liability on the contract. But the rescission must extend to the whole contract. The contract cannot be rescinded in part and affirmed in part. The rescission must be entire.<sup>2</sup> It matters not at what stage of the execution of the contract the fraud was discovered, the contract can be rescinded, provided the parties can be put *in statu quo*.<sup>3</sup>

Scam. (Ill.) 170; White v. Wheaton, 3 Sedden, 352; Newell v. Horn, 45 N. H. 422; Randall v. Hazelton, 12 Allen, 414; Medbury v. Watson, 6 Met. 246; Adams v. Paige, 7 Pick. 542; Fellowes v. Lord Gwyder, 1 Russ. & M. 83; Foster v. Charles, 6 Bing. 396; 7 Bing. 105; First Nat. Bank v. Yocum, 11 Neb. 328; Wiley v. Howard, 15 Ind. 169; Weist v. Grant, 71 Pa. St. 95; Fuller v. Hodgden, 25 Me. 248.

<sup>1</sup> Brown v. Blunt, 72 Me. 415, 421; Marsh v. Cook, 32 N. J. Eq. 262. See Clark v. Tennant, 5 Neb. 549; Mo. Valley Land Co. v. Bushnell, 11 Neb. 192; First Nat. Bank v. Yocum, 11 Neb. 328; Bartlett v. Blaine, 83 Ill. 25.

<sup>2</sup> Miner v. Bradley, 22 Pick. 457; Voorhees v. Earl, 2 Hill, 292; Coolidge v. Brigham, 1 Met. 550; Allen v. Webb, 24 N. H. 278; Luey v. Bundy, 9 N. H. 298; Fullager v. Reville, 3 Hun, 600; Higham v. Harris, 108 Ind. 246; Preston v. Travelers Ins. Co., 58 N. H. 76.

<sup>3</sup> Prentiss v. Russ, 16 Me. 30; Farelis v. Ware, 60 Me. 482; Downer v. Smith, 32 Vt. 1; Matteson v. Holt, 45 Vt. 336; Butler v. Northumberland, 50 N. H. 39; Coolidge v. Brigham, 1 Met. 547; Kimball v. Cunningham, 4 Mass. 502; Waters Pat. Heater Co. v. Smith, 120 Mass. 444; Voorhees v. Earl, 2 Hill, 292; Farrell v. Corbett, 4 Hun, 128; Van Lieuw v. Johnson, 4 Hun, 415; Dows v. Griswold, 4 Hun, 550; Baker v. Lever, 67 N. Y. 304; Croyle v. Moses, 90 Pa. St. 250; Jemison v. Woodruff, 34 Ala. 143; Merritt v. Robinson, 35 Ark. 483; Foulch v. Eckert, 61 Ill. 448; Warren v. Tyler, 81 Ill. 15; Shaw v. Barhart, 17 Ind. 183; Blen v. Bear River, &c., Co., 20 Cal. 602; Cruess v. Fessler, 39 Cal. 336; Morrison v. Lohg, 39 Cal. 381; Collins v. Townsend, 58 Cal. 608; Bank of Woodland v. Hiatt, 53 Cal. 235; Daggett v. Emerson, 3 Story, 700; Pence v. Langdon, 99 U. S. 578; Street v. Blay, 2 Barn. & Ad. 456; Queen v. Saddler's Co., 10 H. L. C. 420; Clarke v. Dickson, El. B. & E. 148; 27 L. J. Q. B. 223; Murray

The right must be exercised within a reasonable time after the discovery of the fraud. If there is any unreasonable delay the right of rescission is lost.<sup>1</sup> There must also be a prompt and complete restoration of everything of value which the party defrauded had received under the contract.<sup>2</sup> If it is of any value to the other party, it must

*v. Mann*, 2 Exch. 538; *Cushma v. Forest*, 4 Cranch, 37; *Chengivo v. Jones*, 3 Wash. C. C. 359; *Gifford v. Carville*, 29 Cal. 589; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Gutling v. Newell*, 9 Ind. 572; *Hall v. Fullerton*, 69 Ill. 448; *Buchanan v. Harvey*, 12 Ill. 386; *Pierce v. Wilson*, 34 Ala. 596; *Hooper v. Strasburger*, 37 Md. 390; *Lowry v. McLane*, 3 Grant (Pa.), 333; *Anthony v. Day*, 52 How. Pr. 35; *Wheaton v. Baker*, 14 Barb. 494; *Kinner v. Kiernan*, 2 Lans. 492; *Perkins v. Bailey*, 99 Mass. 61; *King v. Eagle Mills*, 10 Allen, 551; *Manahan v. Noyes*, 52 N. H. 232; *Getchell v. Chase*, 37 N. H. 110; *Gates v. Bliss*, 48 Vt. 299; *Poor v. Woodburn*, 25 Vt. 234; *Garland v. Spencer*, 46 Me. 528.

<sup>1</sup> *Central R. Co. v. Kish*, L. R. 2 H. L. 99; *Heyman v. European, &c., R. Co.*, L. R. 7 Eq. 154; *Boughton v. Standish*, 48 Vt. 594; *Weeks v. Roble*, 42 N. H. 316; *Ross v. Titterton*, 6 Hun, 280; *Davis v. Betz*, 66 Ala. 206; *Hall v. Fullerton*, 69 Ill. 448; *Rose v. Hurley*, 39 Ind. 77; *Collins v. Townsend*, 58 Cal. 608; *Pence v. Langdon*, 99 U. S. 578; *Bell v. Keepers*, 39 Kan. 105; *St. John v. Hendrickson*, 81 Ill. 350; *Gatling v. Newell*, 9 Ind. 572; *Farmlee v. Adolph*, 28 Ohio St. 10; *Hammond v. Pennock*, 61 N. Y. 145; *Willoughby v. Moulton*, 47 N. H. 205; *Whitcomb v. Denio*, 52 Vt. 332; *Matteson v. Holt*, 45 Vt. 336; *Smith's Case*, L. R. 2 Ch. 604.

<sup>2</sup> *Norton v. Young*, 3 Greenl. 30; *Sumner v. Parker*, 36 N. H. 449; *Willoughby v. Moulton*, 47 N. H. 205; *Perley v. Balch*, 23 Pick. 236; *Jennings v. Gage*, 13 Ill. 610; *Coolidge v. Brigham*, 1 Met. 550; *Miner v. Bradley*, 22 Pick. 457; *Weeks v. Roble*, 42 N. H. 316; *Cushman v. Marshall*, 21 Me. 122; *Thompson v. Peck*, 115 Ind. 512; *Burton v. Stewart*, 3 Wend. 239; *Collins v. Townsend*, 58 Cal. 615; *Kimball v. Cunningham*, 4 Mass. 502; *Getchell v. Chase*, 37 N. H. 110; *Sanborn v. Batchelder*, 51 N. H. 484; *Gifford v. Carville*, 29 Cal. 592; *Schiffer v. Dietz*, 83 N. Y. 300; *Monahan v. Noyes*, 52 N. H. 232; *Bell v. Keepers*, 39 Kan. 105; *Downer v. Smith*, 32 Vt. 7; *Jemison v. Woodruff*, 34 Ala. 143; *Strong v. Strong*, 102 N. Y. 69; *Shepherd v. Temple*, 3 N. H. 457; *Bacon v. Brown*, 4 Blbb, 91; *Christy v. Cummins*, 2 McLean, 386; *Carter v. Walker*, 2 Rich. 40; *Conner v. Henderson*, 5 Mass. 314; *Shaw v. Barnhart*, 17 Ind. 183; *Haase v. Mitchell*, 58 Ind. 213; *Smith v. Bitterham*, 98 Ill. 188; *Morrison v. Lods*, 39 Cal. 381; *Fitz v. Bynum*, 55 Cal. 459; *Merritt v. Robinson*, 35 Ark. 483; *Rose v. Hurley*, 39 Ind. 77; *Dowes v. Griswold*, 4 Hun, 556; *Farrell v. Corbett*, 4 Hun, 128; *Van Lieu v. Johnson*, 4 Hun, 415.

be returned.<sup>1</sup> But things which have no value to any one need not be returned, as, for example, worthless securities or counterfeit money.<sup>2</sup> Nor is a return required of what was necessarily destroyed in the attempt to discover the fraud, as in chemical and other tests of the quality of the goods.<sup>3</sup>

If the parties cannot be restored to the condition in which they were before the execution of the contract, in consequence of the destruction or change in the condition of the property which formed the consideration of the contract, the party defrauded cannot rescind the contract.<sup>4</sup>

It is also necessary that the defrauded party should do nothing after the discovery of the fraud which would in any way admit the existence and validity of the contract. Such an admission, if clear, will operate as a bar to his right of rescission for fraud,<sup>5</sup> for example, it would be fatal to his right to rescind, where he has mingled the property with his own or offered it for sale,<sup>6</sup> or in any other way exercised any rights of ownership over the goods.<sup>7</sup>

<sup>1</sup> *Perley v. Balch*, 28 Pick. 283; *Thayer v. Turner*, 8 Met. 552.

<sup>2</sup> *Brewster v. Burnett*, 125 Mass. 68; *Pence v. Langdon*, 99 U. S. 578; *Smith v. Smith*, 30 Vt. 139; *Royce v. Watrous*, 7 Daly, 87; 78 N. Y. 597; *Hess v. Young*, 59 Ind. 379; *Poulton v. Lattimore*, 9 B. & C. 259; *Dickinson v. Hall*, 14 Pick. 217; *Conner v. Henderson*, 15 Mass. 322; *Becker v. Vroman*, 18 Johns. 302; *Taft v. Wildman*, 15 Ohio, 128; *Donelson v. Young*, 1 Meigs, 155; *Shepherd v. Temple*, 3 N. H. 455; *Knapp v. Lee*, 3 Pick. 457; *Perley v. Balch*, 28 Pick. 283.

<sup>3</sup> *Smith v. Love*, 64 N. C. 489; *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

<sup>4</sup> *Am. Wine Co. v. Brasher*, 13 Fed. Rep. 608; *Smith v. Butterham*, 98 Ill. 188; *West Bank v. Addle*, L. R. 1 Sc. App. 145; *Sawlins v. Wickham*, 3 De Gex & J. 322; *Weeks v. Robie*, 42 N. H. 316; *Butler v. Northumberland*, 50 N. H. 39; *Sanborn v. Batchelder*, 51 N. H. 426; *Monahan v. Noyes*, 53 N. H. 232. But it is held that this destruction or change in the condition of property will not prevent the rescission of the contract, if it is done by the defrauding party, and the defrauded party is willing to accept a partial restoration. *Hammond v. Pennock*, 61 N. Y. 145.

<sup>5</sup> *Brinley v. Tibbets*, 7 Greenl. 70.

<sup>6</sup> *Campbell v. Fleming*, 1 Ad. & E. 40.

<sup>7</sup> *Towers v. Barrett*, 1 T. R. 133; *Okell v. Smith*, 1 Stark. 107; *Milner*



Provided the existence of fraud is ultimately established by competent evidence, the right to rescind the contract will not depend upon the defrauded party's absolute knowledge of the fraud. A party may rescind a contract on suspicions of fraud, if these suspicions are subsequently verified.<sup>1</sup>

The defrauded party may, however, instead of rescinding the contract, affirm it and then recover for the damages which he has suffered in consequence of the fraud in an action of deceit.<sup>2</sup> In the case of the buyer's suit for fraud, the difference between the actual and represented value is the usual measure of damages;<sup>3</sup> but he may recover other consequential damages if such have been sustained.<sup>4</sup> But the party defrauded cannot employ both remedies; he has only his right of election between them.<sup>5</sup>

§ 164. **Material misrepresentations by the seller.** — Fraud is multiform, and it would be both tedious and impossible to give exhaustive illustrations of it. It must suffice to present characteristic examples, from which the reader may determine the practical application of the general principles already set forth in the preceding paragraphs.

It has thus been held to be material misrepresentations,

*v. Tucker*, 1 C. & P. 15; *Cash v. Giles*, 3 C. & P. 407; *Grimaldi v. White*, 4 Esp. 95; *Thurston v. Blanchard*, 22 Pick. 20; *Boorman v. Johnson*, 12 Wend. 506; *Hoadley v. House*, 32 Vt. 129; *Sands v. Taylor*, 5 Johns. 395; *Kimball v. Cunningham*, 4 Mass. 502; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Parker v. Palmer*, 4 Barn. & Ald. 387; *Street v. Blay*, 2 Barn. & Ad. 464; *Groning v. Mendham*, 1 Stark. 257; *Fisher v. Samuda*, 1 Camp. 190.

<sup>1</sup> *Peterson v. Chicago, &c., R. R. Co.*, 38 Minn. 511.

<sup>2</sup> *Clark v. Dickson*, El. Bl. & E. 148; *South, &c., R. R. Co. v. Guest*, 34 Fed. Rep. 628; *Western Bank v. Addie*, L. R. 1 H. L. C. 167; *Queen v. Saddlers Co.*, 10 H. L. C. 421.

<sup>3</sup> *Durst v. Burton*, 2 Lans. 137; *Stiles v. White*, 11 Met. 356.

<sup>4</sup> *Walker v. Moore*, 10 Barn. & C. 421; *Clunez v. Pezzy*, 1 Camp. 8; *Page v. Parker*, 40 N. H. 47; *Jeffrey v. Bigelow*, 13 Wend. 518; *Dimmick v. Lockwood*, 10 Wend. 142; *Fox v. Macbeth*, 2 Cox, 322.

<sup>5</sup> *Junkins v. Simpson*, 14 Me. 364; *Weeks v. Roble*, 42 N. H. 316.

establishing the charge of fraud in the sale of goods, where the vendor sells a note, which he knows has been paid;<sup>1</sup> where he misrepresents the amount of the previous sales of a patented article, which he is offering to sell;<sup>2</sup> where he misrepresented the profits of his business;<sup>3</sup> where he stated falsely that the property he was selling was free from incumbrances;<sup>4</sup> where the vendor of a note states that the makers were "wealthy and responsible men,"<sup>5</sup> where the seller states that a farm yielded a certain quantity of hay;<sup>6</sup> where he sells property when it does not really exist;<sup>7</sup> where he states that railroad bonds are secured by first mortgage.<sup>8</sup>

§ 165. **Employment of puffers or by-bidders at auction and other sales — Other frauds in auction sales.** — The owner of goods, on putting them up for sale at auction, may reserve the right to establish in advance the minimum price, at which the goods may be sold;<sup>9</sup> or he may announce to the by-standers or otherwise make public the fact that he will employ an agent to bid on the property for him, in order to prevent a sacrifice.<sup>10</sup> And some of the cases go the length of holding that the employment of one bidder in good faith for the purpose of preventing a sacrifice, would not be a fraud on the other bidders, although, seemingly, it

<sup>1</sup> *Neff v. Clute*, 12 Barb. 466; *Sibley v. Hulbert*, 15 Gray, 509.

<sup>2</sup> *Crossland v. Hall*, 38 N. J. Eq. 111; *Miller v. Barber*, 66 N. Y. 556; *Somers v. Richards*, 46 Vt. 170.

<sup>3</sup> *Taylor v. Saurman*, 110 Pa. St. 3.

<sup>4</sup> *Ward v. Weman*, 17 Wend. 193; *Haight v. Hoyt*, 19 N. Y. 464; *Mason v. Bovet*, 1 Denio, 69.

<sup>5</sup> *Alexander v. Dennis*, 9 Port. 174.

<sup>6</sup> *Coon v. Atwell*, 46 N. H. 510; *Martin v. Jordan*, 60 Me. 531.

<sup>7</sup> *Wordell v. Fosdick*, 13 Johns. 325.

<sup>8</sup> *Clark v. Edgar*, 84 Mo. 106.

<sup>9</sup> *Steele v. Ellmaker*, 11 S. & R. 86; *Bush v. Cole*, 28 N. Y. 261; *Warlow v. Harrison*, 29 L. J. Q. B. 14; *Wolfe v. Lnyster*, 1 Hall, 146.

<sup>10</sup> *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Staines v. Shore*, 16 Pa. St. 200; *Mainprice v. Westley*, 6 Best. & S. 420.

is not announced or made public.<sup>1</sup> The old English chancery rule permitted the employment of one bidder;<sup>2</sup> but the matter is now regulated by statute in England, and the employment of even one bidder clandestinely is considered to be a fraud on the buyer.<sup>3</sup> But it has always been held to be a fraud, where two or more bidders were employed by the vendor, for the purpose of creating an appearance of competition;<sup>4</sup> or in any case where the employment of a bidder is done for the fraudulent purpose of giving to the property a fictitious value, and this is especially the rule where the sale was advertised to be made "without reserve," etc.<sup>5</sup> The distinction between the employment of

<sup>1</sup> *Phippen v. Stickney*, 3 Met. 387; *Steele v. Ellmaker*, 11 S. & R. 86; *Moncrieff v. Goldsborough*, 4 Har. & McH. 282; *Woods v. Hall*, 1 Dev. Eq. 411; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Latham v. Morrow*, 6 B. Mon. 630; *Lee v. Lee*, 19 Mo. 420; *Veazie v. Williams*, 3 Story, 622; *s. c.* 8 How. 134; *Walsh v. Barton*, 24 Ohio St. 28; *Reynolds v. Dechaumis*, 24 Tex. 174; *Pennock's Appeal*, 14 Pa. St. 446; *Wolfe v. Lnyster*, 1 Hall, 146.

<sup>2</sup> *Green v. Banerstock*, 14 C. B. 204; *Flint v. Woodin*, 9 Hare, 618.

<sup>3</sup> *Mortimer v. Bell*, L. R. 1 Ch. 10; *Heatley v. Newton*, L. R. 19 Ch. D. 326.

<sup>4</sup> *Veazie v. Williams*, 3 Story, 622; *Baham v. Bach*, 13 La. 287; *Jenkins v. Hogg*, 2 Const. (S. C.) 821; *Tomlinson v. Savage*, 6 Ired. Eq. 480; *Troughton v. Johnson*, 3 Hayw. 28; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 481.

<sup>5</sup> *Curtis v. Aspinwall*, 114 Mass. 187; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Woods v. Hall*, 1 Dev. Eq. 411; *Baham v. Bach*, 13 La. 287; *Fisher v. Hersey*, 17 Hun, 370; *Tomlinson v. Savage*, 6 Ired. Eq. 480; *Donaldson v. McRoy*, 1 Browne, 346; *Peck v. List*, 23 W. Va. 338; *Trust v. De La Plaine*, 3 E. D. Smith, 219; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Fowle v. Leavitt*, 23 N. H. 360; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 481; *Wolfe v. Luffster*, 1 Hall, 146; *Pennock's Appeal*, 14 Pa. St. 446; *Staines v. Shore*, 16 Pa. St. 200; *Yerkes v. Wilson*, 81 Pa. St. 9; *Moncrieff v. Goldsborough*, 4 Har. & McH. 282; *McDowell v. Sims*, 6 Ired. Eq. 278; *Latham v. Morrow*, 6 B. Mon. 630; *Darst v. Thomas*, 87 Ill. 222; *Miller v. Baynard*, 2 Houst. 559; *Bexwell v. Christie*, 1 Cowp. 395; *Howard v. Castle*, 6 T. R. 642; *Crowder v. Austin*, 3 Bing. 368; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Banerstock*, 14 C. B. 204; *Rex v. Marsh*, 3 Younge & J. 381; *Gilliatt v. Gilliat*, L. R., 2 Eq. 60; *Wheeler v. Collier*, *Moody & M.* 123.

one bidder for the purpose of preventing a sacrifice of the property, and the employment of one for the purpose of giving the property a fictitious and unreal value, is very fine, and must be ascertained, as it seems to me, solely by the degree to which the fictitious bidding is employed, it being fraudulent if the price of the goods is thereby pushed up above their true market value. The same rules as to puffing apply to all other kinds of sales, including sheriffs' sales.<sup>1</sup>

But in order that the sale may be rescinded by the buyer, on account of puffing or by bidding it is held that the buyer must have been influenced by it to bid more than he had previously determined to do,<sup>2</sup> and the preceding bid must not have been genuine.<sup>3</sup>

The auctioneer may also commit a fraud by having a private signal with any bidder for communicating bids,<sup>4</sup> or by giving any other advantage to one bidder over the others;<sup>5</sup> or by advertising the goods to belong to one party when they were the property of some one else.<sup>6</sup>

But the auctioneer will be justified in refusing to accept bids from a minor,<sup>7</sup> from irresponsible persons in general,<sup>8</sup> or from any one else, if done in good faith and on justifiable grounds.<sup>9</sup>

**§ 166. Seller's expression of opinion — Dealer's talk — His statements as to value and price. — The general rule,**

<sup>1</sup> *Donaldson v. McRoy*, 1 Browne, 340; *Lee v. Lee*, 19 Mo. 420; *Dimmock v. Hallett*, L. R. 2 Ch. 21, 29.

<sup>2</sup> *Jennings v. Hart*, 1 Russ. & Ches. 15; *Veazie v. Williams*, 3 Story, 611; *Tomlinson v. Savage*, 6 Ired. Eq. 580.

<sup>3</sup> *National Bank v. Sprague*, 20 N. J. Eq. 159, 165; *Veazie v. Williams*, 3 Story, 611; but see *Curtis v. Aspinwall*, 114 Mass. 187, 199.

<sup>4</sup> *Conover v. Walling*, 15 N. J. Eq. 173.

<sup>5</sup> *Thomas v. Kerr*, 3 Bush, 619; *Pattison v. Josselyn*, 43 Miss. 373; *Conover v. Walling*, 15 N. J. Eq. 173.

<sup>6</sup> *Thomas v. Kerr*, 3 Bush, 619.

<sup>7</sup> *Kinney v. Showdy*, 1 Hill, 544.

<sup>8</sup> *Hobbs v. Beaver*, 2 Ind. 142; *Den v. Zellers*, 2 Halst. 153.

<sup>9</sup> *Holder v. Jackson*, 11 Up. Can. C. P. 543.

heretofore given<sup>1</sup> that mere expressions of opinion do not constitute a material misrepresentation, finds a special application to questions concerning the seller's fraud. For vendors of goods are very generally in the habit of indulging in more or less extravagant praise of their goods, unduly extolling their merits, as to value and quality. Where their statements are of a general nature, there cannot be much doubt that their use will furnish no ground for the charge of fraud.<sup>2</sup> But when the vendor descends to exaggeration or misstatement of specific facts or qualities, the authorities are divided. For example, it is held by some of the authorities that a willful misstatement of the cost of the goods or of the price that has been offered for them, for the purpose of enhancing the value of the goods, is not a fraud.<sup>3</sup> And it has even been held to be no fraud, for a seller to misstate the appraised value of the goods which he is selling.<sup>4</sup> But, on the other hand, other courts have held such specific misrepresentations of value of the goods, to be a fraud on the buyer which would avoid the sales.<sup>5</sup>

<sup>1</sup> See *ante*, § 158.

<sup>2</sup> *Mowlan v. Cain*, 3 Allen, 263; *Miller v. Young*, 36 Ill. 354; *Chester v. Comstock*, 6 Rob. 1; *Anderson v. Hill*, 12 Smed. & M. 679; *Atwood v. Small*, 6 Ct. & F. 232; *Ormrod v. Huth*, 14 M. & W. 664; *Vernon v. Keys*, 12 East, 687; *Com. v. Jackson*, 132 Mass. 16; *Bishop v. Small*, 63 Me. 14; *Hemmer v. Cooper*, 8 Allen, 334; *Cooper v. Lovering*, 106 Mass. 79; *Holbrook v. Connor*, 60 Me. 578; *State v. Paul*, 69 Me. 215.

<sup>3</sup> *Holbrook v. Connor*, 60 Me. 578; *Bishop v. Small*, 63 Me. 12; *Willard v. Randall*, 65 Me. 81; *Chrysler v. Canaday*, 90 N. Y. 272; *Merriam v. Arbuckle*, 81 Ill. 501; *Righter v. Roller*, 31 Ark. 170; *Wolcott v. Mount*, 38 N. J. L. 496; *Mooney v. Miller*, 102 Mass. 217; *Cooper v. Lovering*, 106 Mass. 79; *Brown v. Leach*, 107 Mass. 364; *Comer v. Perkins*, 124 Mass. 481; *Veasey v. Dayton*, 3 Allen, 381; *Hemmer v. Cooper*, 8 Allen, 334; *Gordon v. Parmlee*, 12 Allen, 212; *Brown v. Castles*, 11 Cush. 350; *Medbury v. Watson*, 6 Met. 259.

<sup>4</sup> *Bourr v. Davis*, 76 Me. 223.

<sup>5</sup> *Van Epps v. Harrison*, 5 Hill, 63; *Page v. Parker*, 43 N. H. 369; *Weadner v. Phillips*, 39 Hun, 1; *Sandford v. Handy*, 23 Wend. 269; where the misrepresentations were of the price which third persons had paid or offered for the goods, *Medbury v. Watson*, 6 Met. 246; *Manning v. Albee*, 11 Allen, 322; *Ives v. Carter*, 24 Conn. 403; *Sandford v. Nandy*,

It has been held to be a fraud,<sup>1</sup> and likewise not a fraud,<sup>2</sup> for the vendor of commercial paper to state falsely that the parties to the paper are financially responsible. It was held to be a fraud for the vendor, in the sale of a business, to represent that it is profitable;<sup>3</sup> whereas it was held to be no fraud for the statement to be made by the seller that the subject-matter of the sale was good oil land.<sup>4</sup> Fraudulent promises of the vendor to do something in the future for the vendee, as well as fraudulent representations as to what the vendee could do with the property, are held not to constitute fraud.<sup>5</sup> On the other hand, a representation that an old stock of goods was "fresh and new," was held to be fraudulent.<sup>6</sup> In another case it was held to be doubtful whether the statement that a horse was "sound and kind" was a fraudulent affirmation of a fact or an irresponsible expression of an opinion.<sup>7</sup>

In all these cases of doubt, it is clearly a question of fact for the jury to determine, avowedly dependent on the intention and understanding of the parties,<sup>8</sup> but, in my judgment, chiefly dependent upon the practices and moral perception of the particular jury.

23 Wend. 269; *Simar v. Canaday*, 53 N. Y. 306; *Kenner v. Harding*, 85 Ill. 264; *McClelland v. Scott*, 24 Wis. 81; *Miller v. Barber*, 66 N. Y. 558; *Cowles v. Watson*, 14 Hun, 41; *Somers v. Richards*, 46 Vt. 170.

<sup>1</sup> *Alexander v. Denuis*, 9 Porter, 174.

<sup>2</sup> *Belcher v. Costello*, 122 Mass. 188.

<sup>3</sup> *Cruess v. Fessler*, 39 Cal. 336; *Somers v. Richards*, 46 Vt. 170; *Miller v. Barber*, 66 N. Y. 558; *Crossland v. Hall*, 33 N. J. Eq. 111.

<sup>4</sup> *Watts v. Cummings*, 59 Pa. St. 84.

<sup>5</sup> *Long v. Woodman*, 58 Me. 52; *Gordon v. Parmlee*, 2 Allen, 212; *Pedduck v. Porter*, 5 Allen, 324; *Mooney v. Miller*, 102 Mass. 217.

<sup>6</sup> *Jackson v. Collins*, 39 Mich. 557.

<sup>7</sup> *Commonwealth v. Jackson*, 132 Mass. 16.

<sup>8</sup> *Morse v. Shaw*, 124 Mass. 59; *Commonwealth v. Jackson*, 132 Mass. 16; *State v. Tomlin*, 29 N. J. L. 13; *Bradley v. Luce*, 99 Ill. 234; *Sharp v. Ponce*, 74 Me. 470; *State v. Heffner*, 84 N. C. 751; *Bigler v. Flickinger*, 55 Pa. St. 279; *Sledge v. Scott*, 56 Ala. 208; *Homer v. Perkins*, 124 Mass. 431.

§ 167. **Seller's concealment or silence when a fraud.** — The general rule is that the seller's silence, when he knows that the buyer is exaggerating the value or qualities of the goods, is not a fraud. And this is certainly the general rule where the buyer has equal facilities with the seller, for discovering the defects in the goods. The seller is not obliged to point out the defects, if they can be discovered by the buyer with reasonable diligence. The rule *caveat emptor* is applied here with all its force.<sup>1</sup> And it has been held to be no fraud, for the vendor to omit unintentionally to disclose defects which could not be discovered so readily by the buyer, the intention to deceive being a necessary element of fraud.<sup>2</sup> But, if he intentionally withholds information of the existence of defects, which are not equally within the ken of the buyer, as where poison has been spilled upon fodder,<sup>3</sup> or where animals are sold for breeding purposes, when the vendor knows they are impotent,<sup>4</sup> it is undoubtedly a fraud.

<sup>1</sup> *Atwood v. Small*, 6 Cl. & T. 288; *Vigers v. Pike*, 8 Cl. & F. 650; *Hart v. Holcombe*, 82 N. H. 185; *Teasey v. Dalton*, 8 Allen, 380; *Lytle v. Bird*, 8 Jones (N. C.) 222; *Port v. Williams*, 6 Ind. 219; *Warner v. Daniels*, 1 Wood & M. 90, 101; *Tuthill v. Babcock*, 2 Wood & M. 298; *Hough v. Richardson*, 3 Story, 659; *Brown v. Leach*, 107 Mass. 364; *Stephens v. Orman*, 10 Fla. 9; *Rocchi v. Schwabacker*, 38 La. An. 1864; *Brown v. Castles*, 11 Cush. 350; *Dickinson v. Lee*, 102 Mass. 559; *Homer v. Perkins*, 124 Mass. 431.

<sup>2</sup> *Stevens v. Fuller*, 8 N. H. 463; *Hanson v. Edgerly*, 29 N. H. 343; *Kintzing v. McElrath*, 5 Pa. St. 467; *Harris v. Tyson*, 24 Pa. St. 347; *Lardlow v. Organ*, 2 Wheat, 178; *Howard v. Gould*, 28 Vt. 528; *Fisher v. Budlong*, 10 R. I. 527.

<sup>3</sup> *French v. Vining*, 102 Mass. 135. See also to same effect, *Dixon v. McClutchey*, Add. 322; *Paddock v. Strobridge*, 29 Vt. 471; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530; *Duvall v. Medtart*, 4 H. & J. 14; *Beninger v. Corwin*, 24 N. J. L. 257; *Dowing v. Dearborn*, 77 Me. 457; *Hough v. Evans*, 4 McCord, 169; *Cardwell v. McClellan*, 3 Sneed, 150; *Stevens v. Fuller*, 8 N. H. 463; *Prentiss v. Russ*, 16 Me. 80; *Milliken v. Chapman*, 75 Me. 322; *Cornelius v. Molloy*, 1 Pa. St. 293; *Hadley v. Clinton, &c., Co.*, 13 Ohio St. 502; *Cecil v. Spurger*, 32 Mo. 462.

<sup>4</sup> *Maynard v. Maynard*, 49 Vt. 297.

In order that the seller's silence may not constitute a fraud, he must do nothing to conceal these defects from the buyer,<sup>1</sup> or to induce him to be less vigilant in his examination of the goods.<sup>2</sup> It will also be a fraud to fail to point out defects in cases in which the usage of trade requires the seller to disclose them.<sup>3</sup>

But it is not a fraud, not to disclose defects in any case where the buyer positively relies upon his own judgment after his examination of the goods, and does not evince any desire to refer to the seller's opinions or statements.<sup>4</sup> It is also not a fraud on the buyer, to conceal defects, where the goods are expressly sold "with all their faults."<sup>5</sup>

§ 168. **Fraudulent devices of buyers.**—The fraudulent devices of buyers may assume a variety of forms, but the more common consist of misrepresentations of the credit and financial standing of the buyer,<sup>6</sup> and of his identity or

<sup>1</sup> *Paddock v. Strowbridge*, 29 Vt. 420; *Maynard v. Maynard*, 49 Vt. 297; *Croyle v. Moses*, 90 Pa. St. 450; *Beninges v. Corwin*, 24 N. J. L. 257; *Cassell v. Herron*, 5 Clark, 250.

<sup>2</sup> *Benj. on Sales*, § 430.

<sup>3</sup> *Horsfall v. Thomas*, 1 Hurt. & C. 90; *Smith v. Hughes*, L. R. 9 Q. B. 597; *Jones v. Bowden*, 4 Taunt. 847.

<sup>4</sup> *Pattison v. Jenks*, 33 Ind. 37; *Stephens v. Orman*, 10 Fla. 9; *Howell v. Biddlecorn*, 62 Barb. 131.

<sup>5</sup> *Pearce v. Blackwell*, 12 Ired. 49; *Pickening v. Dawson*, 4 Taunt. 779; *Freeman v. Baker*, 1 Ad. & E. 508; *Hanson v. Edgerly*, 29 N. H. 343; *Ward v. Hobbs*, L. R. 2 Q. B. D. 331; *s. c.* L. R. 3 Q. B. D. 150; *Gossler v. Eagle Sugar Ref.*, 103 Mass. 331; *Smith v. Andrews*, 3 Ired. 6; *Henshaw v. Robins*, 9 Met. 83, 90; *Taylor v. Fleet*, 4 Barb. 102; *Whitney v. Boardman*, 118 Mass. 247, 248; *Baywater v. Richardson*, 1 Ad. & E. 508; *Baylehole v. Walters*, 3 Camp. 154.

<sup>6</sup> *Luckey v. Roberts*, 25 Conn. 486; *Cary v. Hotalling*, 1 Hill, 311; *Olmstead v. Hotalling*, 1 Hill, 317; *Van Neste v. Conover*, 20 Barb. 547; *Hunter v. Hudson River Iron Co.*, 20 Barb. 494; *Eaton v. Avery*, 83 N. Y. 31; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun, 481; *Devoe v. Brandt*, 53 N. Y. 462; *Gregory v. Schoenell*, 55 Ind. 101; *Lyon v. Briggs*, 14 R. I. 222; *Cain v. Dickinson*, 60 N. H. 371; *Genesee Co. Sav. Bank v. Mich. Barge Co.*, 52 Mich. 164; *Cochran v. Stewart*, 21 Minn. 435; *Williams v. Given*, 6 Gratt. 268.



business connections with other men,<sup>1</sup> of forged recommendation of others<sup>2</sup> and the transfer in payment of the price of worthless securities,<sup>3</sup> counterfeit money,<sup>4</sup> stolen goods,<sup>5</sup> or of checks, which will not be honored on account of the want of funds.<sup>6</sup> The fraud may also consist of a misrepresentation as to the age of the buyer, and a subsequent repudiation of the sale on the ground of the buyer's infancy.<sup>7</sup> It would be a fraud to allow the seller to rely upon the recommendations of third persons, which contain some false representation concerning the buyer.<sup>8</sup> And so, also, to secure goods through an insolvent buyer from the vendor of the goods by making false representations of his credit and financial standing.<sup>9</sup> The fraudulent mis-

<sup>1</sup> *Barker v. Dinsmore*, 72 Pa. St. 427; *Kingsford v. Merry*, 1 H. & N. 508; *McCrittllis v. Allen*, 57 Vt. 505; *Aborn v. Merchants' Despatch Co.*, 135 Mass. 283; *Radcliffe v. Dallinger*, 141 Mass. 1; *Alexander v. Swackhamer*, 105 Ind. 81; *Hardman v. Booth*, 32 L. J. (N. S.) Ex. 105.

<sup>2</sup> *Mowrey v. Walsh*, 8 Cow. 238.

<sup>3</sup> *Mansing v. Albee*, 11 Allen, 520.

<sup>4</sup> *Arnott v. Cloudas*, 4 Dana, 300; *Green v. Humphrey*, 50 Pa. St. 212; *Cochran v. Stewart*, 21 Minn. 435; *White v. Garden*, 10 C. B. 919; *Harner v. Fisher*, 58 Pa. St. 453; *Williams v. Given*, 6 Gratt. 268.

<sup>5</sup> *Titcomb v. Wood*, 38 Me. 563; *Arendale v. Morgan*, 5 Sneed, 703; *Lee v. Portwood*, 41 Miss. 109.

<sup>6</sup> *Hawse v. Crowe*, Ryan & M. 414; *Hodgson v. Barrett*, 33 Ohio St. 63; *Bristol v. Wilshire*, 1 B. & C. 514.

<sup>7</sup> *Badger v. Phinney*, 15 Mass. 359; *Mills v. Graham*, 4 B. & P. 140; *Huge v. Gallans*, 10 Phila. 618; *Wallace v. Morse*, 5 Hill, 391; *Lempriere v. Lange*, 12 Ch. D. 675; *Fitts v. Hall*, 9 N. H. 441. But see *contra*, *Johnson v. Pie*, 1 Keb. 913; 1 Lev. 169; *Price v. Hewett*, 8 Exch. 146; *Liverpool Adelphi Loan Association v. Fairhurst*, 9 Exch. 422. And see *Studwell v. Shapter*, 54 N. Y. 249; *Burley v. Russell*, 10 N. H. 184; *Conrad v. Lanc*, 26 Minn. 389; *Merriam v. Cunningham*, 11 Cush. 40, where it is held that if an infant is sued at common law on his contract, it is not a good replication to the defense of infancy to allege that the plaintiff was induced to make the contract by the infant's fraudulent misrepresentation of his age.

<sup>8</sup> *Fitzsimmons v. Joslin*, 21 Vt. 129; *Ladd v. Lord*, 36 Vt. 194.

<sup>9</sup> *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; *Thomas v. Davenport*, 2 Smith's Lead. Cas. 347; *Meyer v. Amidon*, 23 Hun, 553. See *State v. Schulein*, 45 Mo. 521; *Phelan v. Crosby*, 2 Gill, 462.

representations of the buyer may be made by himself directly to the seller, or indirectly to him through communications to third persons, in general, as well as through the mercantile agencies, whose business it is to furnish to their regular subscribers information concerning the financial standing of merchants. In every such case the fraud of the buyer is sufficient to avoid the sale. But it is held that the misrepresentations must be shown to have been made with the intention to commit a fraud upon the seller or some other persons.<sup>1</sup> But, whether the misrepresentation is made directly or indirectly to the seller, in order that it may constitute a fraud on him, it must be made by the buyer with the intention of influencing the seller's conduct, either in particular, or in general, in common with all other potential sellers.<sup>2</sup>

Fraud, however, may be committed on the seller by dissuading others from bidding at an auction by false representations concerning the conduct of the seller of the goods, or the condition of the goods. This is as much a fraud on the seller, as if he had been influenced by false representations to sell, when he would not otherwise have parted with his goods. For example, it is a fraud where the buyer dissuades others from bidding on the property by misstating the amount of the incumbrance,<sup>3</sup> by paying them for withholding their bids,<sup>4</sup> or out of personal favor to the buyer,<sup>5</sup> or because the seller had wronged the buyer, in withholding the property from him.<sup>6</sup> Although the

<sup>1</sup> *Deickerhoff v. Brown*, 21 Md. Rep. 588; *Lindauer v. Hay*, 61 Iowa, 668; *Victor v. Henlein*, 83 Hun, 549.

<sup>2</sup> *Hill v. Curley*, 8 Hun, 686; *Van Kleeck v. Leroy*, 37 Barb. 544.

<sup>3</sup> *Jackson v. Morter*, 82 Pa. St. 291.

<sup>4</sup> *Morris v. Woodward*, 25 N. J. Eq. 32; *Slingluff v. Eckel*, 24 Pa. St. 472; *Gardiner v. Morse*, 25 Me. 140.

<sup>5</sup> *Gardiner v. Tucker*, 6 R. I. 551.

<sup>6</sup> *Fuller v. Abrahams*, 3 B. & B. 116; *People v. Lord*, 6 Hun, 390; *Jackson v. Morter*, 82 Pa. St. 291; *Raynes v. Crowder*, 14 Up. Can. C. P.

sale will not be avoided, because the buyer dissuaded others from bidding at an execution sale, by truthfully telling them that he was bidding in the interest of the debtor; <sup>1</sup> yet it would, of course, be a fraud if the representation of interest in the debtor was false.<sup>2</sup> And this leads us to the consideration of the general subject of

§ 169. **Combinations of bidders.**—The general proposition is that, whatever may be the mode of chilling or stifling competition among bidders at a sale, any combination of bidders for that purpose would be a fraud upon the seller, sufficient to avoid the sale at the latter's instance.<sup>3</sup> On the other hand, it is held to be permissible for bidders to combine for the purchase of the entire lot of goods offered for sale, and a subsequent division among them of the goods so purchased by their agent, where no one of them would want to purchase the whole lot. The combination, in such a case, is not for the purpose of depressing the price, but to enable a purchase to be made, which is impossible except in combination.<sup>4</sup> And, in the case of

<sup>1</sup> *Dick v. Cooper*, 24 Pa. St. 217.

<sup>2</sup> *Slater v. Maxwell*, 6 Wall. 268; *Cocks v. Izard*, 7 Wall. 559.

<sup>3</sup> *Jones v. Portsmouth, &c.*, 17 R. Co., 82 N. H. 544; *Edsall v. Hamburg M. Co.*, 1 Halst. Ch. 658; *Hamburg M. Co. v. Edsall*, 1 Halst. Ch. 249; *Pattison v. Joselyn*, 43 Miss. 373; *Stockton v. Owlings*, Litt. Sel. Cas. 256; *Seymour v. M. & C. T. Co.*, 10 Ohio, 476; *Stewart v. Nelson*, 25 Mo. 309; *Stewart v. Severance*, 43 Mo. 322; *White Crow v. White King*, 3 Kans. 276; *Forelander v. Hinks*, 6 Ind. 448; *Fleming v. Hutchinson*, 36 Iowa, 519; *Arnold v. Cord*, 16 Ind. 177; *Vantrees v. Hyatt*, 5 Ind. 487; *Griffith v. Judge*, 49 Mo. 536; *Milttenberger v. Morrison*, 39 Mo. 71; *Wooton v. Hinkle*, 20 Mo. 290; *Martin v. Blight*, 4 J. J. Marsh. 491; *Mills v. Rogers*, 2 Litt. 217; *Carson v. Law*, 2 Rich. Eq. 296; *Hamilton v. Hamilton*, 2 Rich. Eq. 355.

<sup>4</sup> *Smith v. Greenlee*, 2 Dev. 126; *Phippen v. Stickney*, 3 Met. 387; *Dexter v. Shepherd*, 117 Mass. 480; *Maire v. Garrison*, 83 N. Y. 14; *Smal v. Jones*, 1 Watts & S. 128; *McMinn v. Phipps*, 3 Sneed, 196; *Switzer v. Skiles*, 3 Gilm. 529; *Kearney v. Taylor*, 15 How. 519; *Crooke v. Dairs*, 5 Grant (Ont.), 317; *Brown v. Fisher*, 9 Grant (Ont.) 423; *Slater v. Maxwell*, 6 Wall. 268; *Jenkins v. Frink*, 30 Cal. 586; *Allen v.*

sales on execution, particularly, the presumption of law is that a combination of bidders is not for any fraudulent purpose of depressing the price, but rather for the lawful purpose of securing a purchase that is otherwise beyond their reach.<sup>1</sup> But if the bidders who enter into the combination do not share in the division of the goods which are purchased, then the combination is presumed to have been made for the fraudulent purpose of depressing the price to the injury of the seller and the sale may be avoided.<sup>2</sup>

§ 170. **Fraudulent intent not to pay.** — When one proposes to buy goods, he makes an express or, at any rate, an implied promise to pay the price. If, therefore, he has no intention whatever of paying for the goods, he has made in effect, if not in fact, a material misrepresentation, in reliance upon the truth of which the seller has parted, or has agreed to part, with his goods. But, whether it is considered a material misrepresentation or not, the great preponderance of authority in this country pronounces a sale

*Stephanes*, 18 Tex. 658; *Dick v. Cooper*, 24 Pa. St. 217; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Wolfe v. Luyster*, 1 Hall, 146; *Gardiner v. Morse*, 25 Me. 140.

<sup>1</sup> *Brisbane v. Adams*, 3 N. Y. 129; *Young v. Snyder*, 3 Grant Cas. 151; *Young v. Smith*, 10 B. Mon. 293; *Switzer v. Skyles*, 8 Hillm. 529; *Jenkins v. Frink*, 30 Cal. 586; *Stewart v. Severance*, 43 Mo. 322; *Buckner v. Chambliss*, 30 Ga. 652; *Bradley v. Kingsley*, 43 N. Y. 534.

<sup>2</sup> *Newman v. Meek*, 1 Freem. Ch. 441; *Gardiner v. Morse*, 25 Me. 140; *Phippen v. Stickney*, 3 Met. 387; *Troup v. Wood*, 4 Johns. Ch. 228; *Wilbur v. Howe*, 8 Johns. 444; *Meech v. Bennett*, Hill & D. 192; *Gulich v. Ward*, 5 Halst. 87; *Slingluff v. Eckel*, 24 Pa. St. 472; *Martin v. Rantell*, 5 Rich. 541; *Johnson v. La Motte*, 6 Rich. Eq. 347; *Dudley v. Little*, 2 Ohio, 505; *Hook v. Turner*, 22 Mo. 338; *Pratt v. Oliver*, 1 McLean, 295; *Cocks v. Izard*, 7 Wall. 559; *Loyd v. Malone*, 23 Ill. 43; *Wootton v. Hinkle*, 20 Mo. 290; *Haynes v. Crutchfield*, 7 Ala. 189; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Woods v. Hudson*, 5 Munf. 423; *Dick v. Lindsay*, 2 Grant Cas. 431; *Trust v. Delaplaine*, 3 E. D. Smith, 219; *Thompson v. Davis*, 13 Johns. 112; *Doolin v. Ward*, 6 Johns. 194; *Jones v. Caswell*, 3 Johns. Cas. 29; *Fenner v. Tucker*, 6 R. I. 551; *Pike v. Balch*, 38 Me. 202; *Rodges v. Rodgess*, 13 Grant (Ont.) 143; *James v. Fulerad*, 5 Tex. 512; *Farr v. Simms*, Rich. Eq. 122.

fraudulent, in which the buyer had formed a preconceived intention not to pay for the goods. The sale may for this reason be avoided by the seller.<sup>1</sup>

But while the existence and knowledge, or the early anticipation, of insolvency by the buyer and the absence of any reasonable expectation of ability to pay are facts which tend to prove the fraudulent intent not to pay for the goods — it may be the principal facts<sup>2</sup> — they are not sufficient (alone) to prove this fraudulent intent.<sup>3</sup> But if they are

<sup>1</sup> *Donaldson v. Farwell*, 93 U. S. 631; *Carnahan v. Bailey*, 28 Fed. Rep. 519; *Thompson v. Taylor*, 15 Phila. 250; *Redington v. Roberts*, 25 Vt. 694; *Rowley v. Bigelow*, 12 Pick. 307; *Dow v. Sanborn*, 3 Allen, 182; *Thompson v. Rose*, 16 Conn. 81; *Mulliken v. Millar*, 12 R. I. 296; *Ash v. Putnam*, 1 Hill, 802; *Cary v. Hotalling*, 1 Hill, 311; *Meacham v. Collignor*, 7 Daly, 402; *Schufeldt v. Schnitzler*, 21 Hun, 462; *Buckley v. Archer*, 21 Barb. 585; *Nichols v. Pinner*, 18 N. Y. 295; 23 N. Y. 265; *Paddon v. Taylor*, 44 N. Y. 371; *Wright v. Brown*, 67 N. Y. 1; *Mears v. Waples*, 3 Houst. 581; 4 Houst. 62; *Peters v. Hilles*, 48 Md. 506; *Loel v. Flash*, 66 Ala. 526; *Des Farges v. Pugh*, 93 N. C. 31; *Lane v. Robinson*, 18 B. Mon. 623; *Bidault v. Wales*, 19 Mo. 36; 20 Mo. 546; *Taylor v. Mississippi Mills (Ark.)*, 1 So. Rep. 283; *Talcott v. Henderson*, 31 Ohio St. 162; *Shipman v. Seymour*, 40 Mich. 283; *Kloppenstein v. Mulcahy*, 4 Nev. 296; *Bell v. Ellis*, 33 Cal. 620; *Seligman v. Kalkman*, 8 Cal. 207; *Allen v. Hartfield*, 76 Ill. 358; *Oswego Starch Factory v. Lendoum*, 57 Iowa, 573; *Rice v. Cutter*, 17 Wis. 362; *Fox v. Webster*, 46 Mo. 181; *Baldwin v. Franklin*, 8 Lea, 67; *Wood v. Yeatman*, 15 B. Mon. 271; *Wilson v. White*, 80 N. C. 280; *Dellone v. Hull*, 47 Md. 112; *Powell v. Bradlee*, 9 Gill & J. 220; *Stoutenborough v. Koukle*, 15 N. J. Eq. 33; *Devoe v. Brandt*, 53 N. Y. 462; *Hennequin v. Naylor*, 24 N. Y. 239; *Hall v. Naylor*, 18 N. Y. 588; *Barnard v. Campbell*, 65 Barb. 286; *Mitchell v. Worden*, 20 Barb. 253; *Byrd v. Hall*, 2 Keyes, 646; *Bigelow v. Heaton*, 6 Hill, 44; *King v. Phillips*, 8 Bosw. 603; *Ayres v. French*, 41 Conn. 142, 153; *Kline v. Baker*, 99 Mass. 253; *Wiggin v. Day*, 9 Gray, 97; *Stewart v. Emerson*, 52 N. H. 301; *Burrill v. Stevens*, 73 Me. 395; *Hanchett v. Mansfield*, 16 Ill. App. 407; *Catlin v. Warren*, 16 Ill. App. 418; *Lee v. Simmons*, 65 Wis. 523; *Parker v. Byrnes*, 1 Low. C. C. 539; *Davis v. Stewart*, 8 Fed. Rep. 803; *Ferguson v. Carrington*, 9 B. & C. 59; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598; *Biggs v. Barry*, 2 Curt. (U. S.) 262.

<sup>2</sup> *Hennequin v. Naylor*, 24 N. Y. 139; *Talcott v. Henderson*, 31 Ohio St. 162; *Thompson v. Rose*, 16 Conn. 71.

<sup>3</sup> *Cross v. Peters*, 1 Greenl. 378; *Redington v. Roberts*, 25 Vt. 694; *Morrill v. Blackman*, 42 Conn. 324; *Lloyd v. Brewster*, 4 Paige, 537;

accompanied by other facts, such as an immediate sale of the goods at a greatly reduced price, or a transfer of them to some other creditor, or the secretion of the property, as soon as it is received, and the like, which tend to prove a preconcerted plan to accumulate some money before a suspension of business, the jury can infer from such a combination of facts that the buyer had a preconceived design not to pay for the goods, and hence the sale was fraudulent.<sup>1</sup>

The intention not to pay must be absolute, in order to taint the sale with fraud. It is not fraudulent, if the buyer simply had the intention not to pay at the time agreed upon, and in accordance with the terms of the contract, if he honestly intended to pay at some other time.<sup>2</sup>

*Johnson v. Monell*, 2 Abb. App. 470; *Byrd v. Hall*, 2 Keyes, 646; *Hennequin v. Naylor*, 24 N. Y. 189; *Biddle v. Black*, 99 Pa. St. 380; *Powell v. Bradlee*, 9 Gill & J. 220; *Talcott v. Henderson*, 81 Ohio St. 162; *Garbutt v. Bank*, 22 Wis. 384; *Conyers v. Ennis*, 2 Mason, 236; *Ex parte Whittaker*, L. R. 10 Ch. 446; *Burrill v. Stevens*, 73 Me. 395; *Schufeldt v. Schnitzler*, 21 Hun, 462; *Wright v. Brown*, 67 Hun, 4; *Kloppenstein v. Mulcahy*, 4 Nev. 296; *Belding v. Frankland*, 8 Lea, 67; *Nichols v. Pinner*, 18 N. Y. 295; *Ontario Copper Co. v. Lightning-rod Co.*, 29 Up. Can. C. P. 491; *Biggs v. Barry*, 2 Curt. C. C. 259; *Shipmen v. Seymour*, 40 Mich. 274; *Klein v. Rector*, 57 Miss. 538; *Mears v. Waples*, 8 Houst. 581; 4 Houst. 62; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Fish v. Payne*, 14 N. Y. 586; 7 Hun, 586; *Ellison v. Bernstein*, 60 How. Pr. 145; *Andrew v. Dieterich*, 14 Wend. 81; *Rowley v. Bigelow*, 12 Pick. 307; *Hodgeden v. Hubbard*, 18 Vt. 504; *Bell v. Ellis*, 33 Cal. 620; *Bidault v. Wales*, 19 Mo. 36; 20 Mo. 547; *Morris v. Talcott*, 96 N. Y. 100; *Morrison v. Shuster*, 1 Mackey, 190; *Dalton v. Thurston*, 3 N. E. Rep. 383; *Kelsey v. Harrison*, 29 Kan. 143. But see, *contra*, *Davis v. Stewart*, 3 MCrary C. C. 174; 8 Fed. Rep. 803, where it has been held under the bankruptcy law that the purchase of goods, when one knows himself to be insolvent, and that he has no reasonable expectations of ability to pay, is fraudulent, at least as between the seller and the buyer's assignee in bankruptcy.

<sup>1</sup> *Wiggin v. Day*, 9 Gray, 97; *Des Farges v. Pugh*, 93 N. C. 81; *Parker v. Byrnes*, 1 Low. C. C. 539, 542; *Davis v. McWhirter*, 8 Up. Can. Q. B. 598; *Wilson v. White*, 80 N. C. 280; *Jordan v. Osgood*, 109 Mass. 462; *Hennequin v. Naylor*, 24 N. Y. 189; *Talcott v. Henderson*, 81 Ohio St. 162; *Thompson v. Rose*, 16 Conn. 71; *Lee v. Simmons*, 65 Wis. 523.

<sup>2</sup> *Bidault v. Woles*, 20 Mo. 546; *Mitchell v. Worden*, 20 Barb. 253; *Buckley v. Artcher*, 21 Barb. 585.

And the intention not to pay must be adopted prior to the sale, in order to make the sale fraudulent. If it be not a pre-determined intention not to pay, but one which was taken up after the sale had been made, while it is fraudulent, cannot have a retrospective effect and thus taint the contract of sale. The title to the goods cannot, on account of this subsequent determination not to pay, be recovered by an avoidance of the contract of sale.<sup>1</sup> But it has been held that this fraudulent intention not to pay will avoid the sale, if it is made at any time before the sale is completed by a delivery of the goods.<sup>2</sup>

In Pennsylvania, however, it is held that there must be some further proof of an intention to deceive, in order to avoid the sale, than the concealment of the buyer's insolvency and his intention not to pay. It is required that there must be "artifice intended and fitted to deceive."<sup>3</sup>

§ 171. **Concealment of material facts by the buyer.**— The buyer is no more required than is the seller to disclose facts within his knowledge, which would materially affect the negotiations for the sale of the goods, such as those which would enhance the price of the goods,<sup>4</sup> or

<sup>1</sup> *Burrill v. Stevens*, 73 Me. 395; *Biggs v. Barry*, 2 Curt. C. C. 259; *Rowley v. Bigelow*, 12 Pick. 307; *Parker v. Byrnes*, 1 How. 539; *Cross v. Peters*, 1 Greenl. 378. See, also, *Des Farges v. Pugh*, 93 N. C. 31; *Lee v. Simmons*, 65 Wis. 523; *Taylor v. Mississippi Mills*, 1 So. Rep. 283; citing, *Ex parte Whittaker*, L. R. 10 Ch. App. 446; *Biggs v. Barry*, 2 Curt. C. C. 259; *Hoffman v. Noble*, 6 Met. 68; *Nichols v. Pinner*, 18 N. Y. 295; *Bridgeford v. Adams*, 45 Ark. 136; *Merritt v. Robinson*, 35 Ark. 483; *Cross v. Peters*, 1 Greenl. 376; *Stewart v. Emerson*, 52 N. H. 301; *Donaldson v. Farwell*, 93 U. S. 631.

<sup>2</sup> *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630; *Pike v. Wieting*, 49 Barb. 314. But see, *contra*, *Burrill v. Stevens*, 73 Me. 395.

<sup>3</sup> *Smith v. Smith*, 21 Pa. St. 367; *Backentoss v. Speicer*, 31 Pa. St. 324. See *Hamer v. Fisher*, 58 Pa. St. 453; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Wilson v. White*, 80 N. C. 280; *Bell v. Ellis*, 33 Cal. 620; *Kline v. Baker*, 99 Mass. 253.

<sup>4</sup> *Laidlaw v. Organ*, 2 Wheat. 178; *Harris v. Tyson*, 24 Pa. St. 347; *Kintzing v. McElrath*, 5 Pa. St. 467; *Matthews v. Bliss*, 22 Pick. 48;

which relate to the solvency of the buyer,<sup>1</sup> or any other facts.

The buyer is not obliged to disclose facts within his knowledge, unless he assumes an obligation to furnish information.<sup>2</sup>

But the buyer must scrupulously abstain from the use of any statements or actions, which are calculated to disarm suspicion, and to mislead on account of being half-truths. In any such case, the combination of silence and a misleading act or word is equivalent to an actual misrepresentation of a material fact, and will taint the sale with fraud.<sup>3</sup>

§ 172. **Expressions of opinion by buyer.** — The buyer's statements of fact are also divided into irresponsible expressions of opinion and fraudulent misrepresentations of

*Smith v. Beatty*, 2 Ired. Eq. 456; *Butler's Appeal*, 26 Pa. St. 63; *Fox v. Mackreth*, 2 Bro. Ch. 420.

<sup>1</sup> *Cross v. Peters*, 1 Greenl. 378; *Redington v. Roberts*, 25 Vt. 694; *Morrill v. Blackman*, 42 Conn. 324; *Lloyd v. Brewster*, 4 Paige, 537; *Johnson v. Monell*, 2 Abb. App. 470; *Byrd v. Hall*, 2 Keyes, 646; *Hennequin v. Naylor*, 24 N. Y. 139; *Biddle v. Black*, 99 Pa. St. 380; *Powell v. Bradlee*, 9 Gill & J. 220; *Talcott v. Henderson*, 31 Ohio St. 162; *Garbutt v. Bank*, 22 Wis. 384; *Conyiss v. Ennis*, 2 Mason, 236; *Ex parte, Whitaker*, L. R. 10 Ch. 446; *Burrill v. Stevens*, 73 Me. 395; *Schufeldt v. Schutzler*, 21 Hun, 462; *Wright v. Brown*, 67 Hun, 4; *Kloppenstien v. Mulcahy*, 4 Nev. 296; *Belding v. Frankland*, 8 Lea, 67; *Nichols v. Pinner*, 18 N. Y. 295; *Ontario Copper Co. v. Lightning Rod Co.*, 29 Up. Can. C. P. 491; *Biggs v. Barry*, 2 Curt. C. C. 259; *Shipman v. Seymour*, 40 Mich. 274; *Klein v. Rect or*, 57 Miss. 538; *Mears v. Waples*, 3 Houst. 581; 4 Houst. 62; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Fish v. Payne*, 7 Hun, 586; *s. c.* 14 N. Y. 586; *Ellison v. Bernstein*, 60 How. Pr. 145; *Andrew v. Dieterich*, 14 Wend. 81; *Rowley v. Bigelow*, 12 Pick. 307; *Hodgeden v. Hubbard*, 18 Vt. 504.

<sup>2</sup> *Dambmann v. Schulting*, 75 N. Y. 55, 62. See *Carpenter v. Danforth*, 52 Barb. 581; *Fisher v. Bodlong*, 10 R. I. 525; *Board of Tippecanoe Co. v. Reynolds*, 44 Ind. 509.

<sup>3</sup> *Turner v. Harvey*, Jacob, 178; *Bench v. Shelden*, 14 Barb. 66; *Prescott v. Wright*, 4 Gray, 461; *Paul v. Hadley*, 23 Barb. 521; *Dambmann v. Schulting*, 75 N. Y. 62; *Smith v. Countryman*, 39 N. Y. 655, 681; *Howard v. Gould*, 28 Vt. 523; *Hadley v. Clinton Co.*, 13 Ohio St. 502. But see *Vernon v. Keys*, 12 East. 632; 4 Taunt. 488.



fact. It is not always possible to draw the line very clearly between the two, but it may be stated generally that when the statement is very general in its terms, and in no way specific, or is so common that no one of ordinary prudence is misled thereby, it is called a mere expression of opinion; and although it may be false, it does not avoid the sale which ensues.<sup>1</sup>

§ 173. **Liability of principals, partners, and joint-owners for agent's fraudulent misrepresentations.** — The principal and agent are properly considered, in respect to the rights of third persons who have dealings with them, as one person, and it does not matter which of them commits a fraud in making the contract, the principal will at least be liable so far as to be compelled to make restitution of every thing which he has derived from and under the contract, or pay for the value of the same.<sup>2</sup> And inasmuch as the agent is the *alter ego* of the principal in relation to all that he does within the scope of his authority it would follow

<sup>1</sup> See *Belcher v. Costello*, 122 Mass. 189; *Van Epps v. Harrison*, 5 Hill, 63; *Ellis v. Andrews*, 56 N. Y. 83; *Watts v. Cummings*, 59 Pa. St. 84; in which false expressions of the buyer's financial standing were considered not fraudulent. On the other hand, see *McClellan v. Scott*, 24 Wis. 81; *Simar v. Canaday*, 53 N. Y. 298; *Morse v. Shaw*, 124 Mass. 59; *Homer v. Perkins*, 124 Mass. 431; *Stubbs v. Johnson*, 127 Mass. 219. So, also, it was held to be no fraud for one falsely to say, "that is all I will give" and the like. *Humphrey v. Haskell*, 7 Allen, 498; *Vernon v. Keyes*, 12 East, 638; 4 Taunt. 488.

<sup>2</sup> *Veazie v. Williams*, 8 How. 184; *Jewett v. Carter*, 132 Mass. 335; *Lamm v. Port Deposit Ass'n*, 49 Md. 233; *Chester v. Dickerson*, 52 Barb. 350; *Graves v. Spier*, 58 Barb. 349; *Presby v. Parker*, 56 N. H. 409; *Sharp v. Mayor of N. Y.*, 40 Barb. 256; *Hunter v. Hudson River Co.*, 20 Barb. 493; *Concord Bank v. Gregg*, 14 N. H. 331; *Fogg v. Griffin*, 2 Allen, 1; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Mundorff v. Wickersham*, 63 Pa. St. 87; *McClellan v. Scott*, 24 Wis. 81; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *New York, &c., R. R. Co. v. Shuyler*, 84 N. Y. 30; *Durst v. Burton*, 47 N. Y. 167; *Ludgate v. Love*, 44 L. T. (N. S.) 694; *Mackay v. Commercial Bank*, L. R. 5 B. C. 394; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Cas. 317; *Weir v. Bell*, 3 Ex. D. 238; *Swire v. Francis*, L. R. 3 App. Cas. 106.

logically that the principal would be responsible civilly in an action of deceit for all the damages which the other party has suffered from the fraud of the agent. This rule applies equally to joint-owners and partners of the property which is sold or bought, and the cases cited apply the principle to all such cases.<sup>1</sup> But it has been held in several recent cases, that the action of deceit will not lie against the innocent principal for the fraud of the agent, unless after learning of the fraud he distinctly approves of and affirms the fraud.<sup>2</sup>

Where the principal instructs an agent to make use of a representation which the principal knows to be false, but which the agent supposes to be true, the innocence of the agent will not shield the principal from responsibility for his own fraud.<sup>3</sup>

§ 174. **Frauds on creditors — Transfers without consideration — Voluntary conveyances — Transfers for the purpose of hindering or delaying creditors.** — The cases, to which the subject of this paragraph refers, cover all sorts of transfers which are made for the purpose of defrauding the vendor's creditors. They are to be distinguished from the frauds upon the vendor or vendee by the fact that the frauds upon creditors never affect the validity of the sale as between the parties to the contract. If either

<sup>1</sup> *Locke v. Stearns*, 1 Met. 560; *Fitzsimmons v. Joslin*, 21 Vt. 139; *Bennett v. Judson*, 21 N. Y. 239; *Indianapolis, &c., R. R. Co. v. Tyng*, 63 N. Y. 653; *Durant v. Rogers*, 87 Ill. 511; *Elwell v. Chamberlin*, 31 N. Y. 619; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. 479; *Reynolds v. Witte*, 13 S. C. 5; *Wolfe v. Pugh*, 101 Ind. 294; *Law v. Grant*, 37 Wis. 548; *Reed v. Peterson*, 91 Ill. 297; *Craig v. Ward*, 3 Keyes, 387; *Durst v. Burton*, 2 Lans. 137; 47 N. Y. 174; *Griswold v. Haven*, 25 N. Y. 595; *Jeffrey v. Bigelow*, 13 Wend. 518; *White v. Sawyer*, 16 Gray, 586.

<sup>2</sup> *Kennedy v. McKay*, 43 N. J. L. 288; *Western Bank v. Addie*, L. R. 1 H. L. C. 146; *Udell v. Atherton*, 7 H. & N. 172. See *Krumm v. Beach*, 25 Hun, 293; 86 N. Y. 311. But see *Barrick v. Eng., &c., Bank*, L. R. 2 Ex. 259; *Oakes v. Turquand*, L. R. 2 H. L. 325.

<sup>3</sup> *Ludgater v. Love*, 44 L. T. (N. S.) 694.

of the parties is bound by the contract of sale, both are.<sup>1</sup> And, if there is a valuable consideration to the contract, both parties are liable to each other for a breach of the contract. The existence of this fraud upon the vendor's creditors does not enable the vendor to rescind the sale and recover his property<sup>2</sup> which has so far become the property of the vendee as that he may insure it against fire and other risks, and in case of loss, hold the insurance money against the vendor.<sup>3</sup> Nor can the vendee avoid the payment of the consideration of the sale on account of the fraud upon the vendor's creditors<sup>4</sup> although if the sale should be avoided by the vendor's creditors, there would be a failure of consideration, which would enable the vendee to recover back the price paid for the goods, or to defend any action by the vendor for the breach of the contract, if he has not paid it.<sup>5</sup>

Questions concerning the frauds upon creditors arise

<sup>1</sup> *Harvey v. Varney*, 98 Mass. 118; *Hill v. Pine River Bank*, 45 N. H. 300; *Barrows v. Barrows*, 9 N. E. Rep. 371; *Williams v. Lowe*, 4 Humph. 62; *Burgett v. Burgett*, 1 Ohio, 469; *Springer v. Drosch*, 32 Ind. 486; *Douglass v. Dunlop*, 10 Ohio, 162; *Walton v. Bonham*, 24 Ala. 513; *Chapin v. Pease*, 10 Conn. 69; *Neely v. Wood*, 10 Yerg. 486; *Sherk v. Endres*, 8 W. & S. 255; *Ybarra v. Lorenzana*, 53 Cal. 197.

<sup>2</sup> *Osborne v. Morse*, 7 Johns. 161; *Murphy v. Hubert*, 16 Pa. St. 50; *Telford v. Adams*, 6 Watts, 429; *Broughton v. Broughton*, 4 Rich. 491; *Jackson v. Garnsay*, 16 Johns. 189. The contract of sale may also be enforced against the vendor's heirs and representatives. *Drinkwater v. Drinkwater*, 4 Mass. 354; *Dearman v. Radcliffe*, 5 Ala. 192; *Clapp v. Tirrell*, 20 Pick. 247; *Garner v. Graves*, 54 Ind. 188; *Reichart v. Castator*, 5 Binn. 109; *Beebe v. Sautler*, 37 Ill. 519; *Stephens v. Harrow*, 26 Iowa, 458.

<sup>3</sup> *Lerow v. Wilmarth*, 9 Allen, 385. And the vendee's creditors may also claim the insurance money as against the grantor. *Maher v. Swift*, 14 Nev. 324.

<sup>4</sup> *Butler v. Moore*, 73 Me. 151; *Davey v. Kelley*, 66 Wis. 457; *Car-penter v. McClure*, 39 Vt. 9; *Findley v. Cooley*, 1 Blackf. 262; *Gary v. Jacobson*, 55 Miss. 204; *Bryant v. Mansfield*, 22 Me. 360; *Dyer v. Homer*, 22 Pick. 253. But see *Church v. Muir*, 33 N. J. L. 320; *Niver v. Best*, 10 Barb. 369; *Neelis v. Clark*, 4 Hill, 424.

<sup>5</sup> *Dyer v. Homer*, 22 Pick. 253.

under the statutes 13 Eliz. ch. 5, and 27 Eliz. ch. 4, which have been substantially re-enacted in all the States of this country. The statutes are said to be affirmatory of the common law, at the most only enforcing its principles more stringently.<sup>1</sup> Whether this be so is a matter of very little importance, since these statutes are uniform in their terms and have been enacted very generally. The original statute, as well as all copies of it, declare to be void all conveyances of property, both real and personal, which are not made in good faith and upon a valuable consideration, but upon trust for the benefit of the grantor,<sup>2</sup> or made in any other way for the purpose of hindering, delaying, or defrauding creditors.<sup>3</sup>

The first point to be observed, in determining under the statute of Elizabeth when a sale is fraudulent as to creditors, is that the law will not imply a sale or transfer of goods to be fraudulent, if it be based upon a valuable consideration. Such transfers of property are presumed to be *bona fide*. But this presumption is not conclusive. The presence of a valuable consideration in the sale is not at all inconsistent with the fraudulent intent to defraud creditors.<sup>4</sup> If the sale was actually made with a fraudu-

<sup>1</sup> Cadogan, *v.* Kennett, Cowp. 432; 2 Kent Com. 515; Whittlesey *v.* McMahon, 10 Conn. 141; Avery *v.* Street, 6 Watts, 248; Hudnal *v.* Wilder, 4 McCord, 297; Doyle *v.* Sleeper, 1 Dana, 533; Hamilton *v.* Russell, 1 Cranch, 316; Meeker *v.* Wilson, 1 Gall. 419; Adams *v.* Broughton, 13 Ala. 739; O'Daniel *v.* Crawford, 4 Dev. 203; Wilt *v.* Franklin, 1 Binn. 514, 523; Whitmore *v.* Woodward, 28 Me. 392.

<sup>2</sup> Any trust for the benefit of the grantor is a fraud upon the grantor's creditors. Twyne's Case, 3 Coke, 80; 1 Smith Lead. Cas. 1; Franklin *v.* Clafin, 49 Md. 24; Jones *v.* King, 86 Ill. 225; Edwards *v.* Stinson, 59 Ga. 443; Young *v.* Heermans, 66 N. Y. 374.

<sup>3</sup> It may be proper to state here that the cases, which are cited in support of proposition offered in discussion of the effect of this statute, do not always consist of sales of personal property, a large number being conveyances of real property. But the same statute governs both classes of conveyances, and the principles would apply to every case coming up under the statute.

<sup>4</sup> Nugent *v.* Jacobs, 103 N. Y. 125; Roeber *v.* Bowe, 26 Hun, 554;

lent intent to defeat the claims of creditors, it may be avoided by them, notwithstanding it is supported by a valuable consideration, if the purchaser was cognizant of the seller's fraudulent intent, and bought the property for the purpose of aiding the seller in his fraudulent design.<sup>1</sup> But if the purchaser does not participate in the seller's fraud, and pays a valuable consideration for the goods, the sale will not be voidable by the creditors, because it was made by the seller for the purpose of defeating the execution of a creditor.<sup>2</sup> But in order that the sale may be avoided, notwithstanding the payment of a valuable con-

*Johnston v. Dick*, 27 Miss. 277; *Peck v. Land*, 2 Kelly, 1; *Billings v. Russell*, 101 N. Y. 226; *Singer v. Jacobs*, 3 McCrary, 638; *Ayers v. Moore*, 2 Stew. 336; *Wadsworth v. Williams*, 100 Mass. 126; *Howe v. Ward*, 4 Greenl. 195.

<sup>1</sup> *Swinerton v.* 1 Dane Abr. 628; *Kimball v. Thompson*, 4 Cush. 447; *Dalglish v. McCarthy*, 19 Grant's Ch. 578; *Spring Lake Iron Co. v. Waters*, 50 Mich. 13; *Hessing v. McCloskey*, 37 Ill. 341; *Anderson v. Warner*, 5 Bradw. 416; *Green v. Tanner*, 8 Met. 411; *Foster v. Hall*, 12 Pick. 89; *Bridge v. Eggleston*, 14 Mass. 245.

<sup>2</sup> *Wood v. Dixie*, 7 Q. B. 892; *Riches v. Evans*, 9 C. & P. 940; *Alton v. Harrison*, L. R. 4 Ch. 622; *Boldero v. London Loan & Discount Co.*, 5 Ex. D. 47; *Spencer v. Slater*, L. R. 4 Q. B. D. 13; *Hale v. Metr. Omnibus Co.*, 28 L. J. Ch. 777; *Farish v. McKay*, 5 Up. Can. Q. B. 461; *Hooker v. Jarvis*, 6 Up. Can. Q. B. (o. s.) 439; *Armstrong v. Moodie*, 6 Up. Can. Q. B. (o. s.) 538; *Conner v. Miller*, 1 Kerr (N. B.), 302; *Ingraham v. Wheeler*, 6 Conn. 277; *Stacey v. Deshaw*, 7 Hun, 449; *Ford v. Johnston*, 7 Hun, 563; *Archer v. O'Brien*, 7 Hun, 591; *Bostwick v. Burnett*, 74 N. Y. 317; *Francis v. Rankin*, 84 Ill. 169; *Matthews v. Jordan*, 88 Ill. 602; *Gray v. McAllister*, 50 Iowa, 497; *Story v. Agnew*, 2 Bradw. 353; *Mimmo v. Kuykendall*, 85 Ill. 476; *Morris v. Tilton*, 81 Ill. 607; *Dudley v. Danforth*, 61 N. Y. 626; *Hauselt v. Vilmar*, 2 Abb. N. C. 222; *Kinnear v. White*, 2 Kerr (N. B.), 235; *Hayward v. White*, 2 Kerr, 319; *Doak v. Johnson*, 2 Kerr, 319; *Dalglish v. McCarthy*, 19 Grant (Ont.), 578; *Clark v. Morrell*, 21 Up. Can. Q. B. 596; *Oriental Bank v. Haskins*, 3 Met. 340; *Wadsworth v. Williams*, 100 Mass. 131; *Clapp v. Tirrell*, 20 Pick. 247; *Verplauk v. Sterry*, 12 Johns. 553; *Wright v. Brandis*, 1 Ind. 386; *Ruffing v. Tilton*, 12 Ind. 260; *Hughes v. Monty*, 24 Iowa, 499; *Chapel v. Clapp*, 29 Iowa, 194; *Wright v. Howell*, 35 Iowa, 292; *Carpenter v. Murin*, 42 Barb. 300; *Jackson v. Henry*, 10 Johns. 185; *Somes v. Brewer*, 2 Pick. 184.

sideration, the purchaser must actually know of the fraudulent intent. It is held that it is not sufficient if he only has reasonable cause to suspect or believe that the seller has such a fraudulent intent.<sup>1</sup> The vendor's fraudulent intent may be established by any competent testimony. Each case stands upon its own footing, and the court and jury must examine into the circumstances of the particular case, and determine from them whether the sale was made in good faith or for the purpose of defeating the creditors.<sup>2</sup>

Under the term *valuable consideration* is included everything possessing a pecuniary value, and likewise a promise to marry, as well as actual marriage. Conveyances possessing any one of these considerations are not voluntary.<sup>3</sup> But, although the valuable consideration must be substantial, in order to protect the purchaser against the claims of the seller's creditors, it need not be adequate.<sup>4</sup>

If a transfer of property is made without a substantial valuable consideration, while the grantor is in debt, existing creditors can, under certain circumstances at least, avoid the conveyance, and satisfy their demands by proceeding against the property. If the conveyance is to any one except a child or wife, or, in other words, where there

<sup>1</sup> *Carroll v. Hayward*, 124 Mass. 121; *State v. Merritt*, 70 Mo. 275; *Kyle v. Ward*, 1 So. Rep. 468. But see, apparently *contra*, *Lyons v. Hamilton*, 69 Iowa, 47; *Bartles v. Gibson*, 17 Fed. Rep. 298.

<sup>2</sup> *Hale v. Metr. Omnibus Co.*, 28 L. J. Ch. 777; *Lang v. Stockwell*, 55 N. H. 561; *Solomon v. Moral*, 53 How. Pr. 342; *Cutting v. Jackson*, 56 N. H. 253; *Jones v. Nevers*, 2 Pugs. & Bur. 627.

<sup>3</sup> *Rodgers v. Langham*, 1 Sid. 183; *Washband v. Washband*, 27 Conn. 424; *Huston v. Cantril*, 11 Leigh, 176; *Rockhill v. Spraggs*, 9 Ind. 82. So taking the goods for a pre-existing debt is a sale for a valuable consideration. *Dudley v. Danforth*, 61 N. Y. 626. See *post*, § 175, fraudulent preferences.

<sup>4</sup> *Washband v. Washband*, 27 Conn. 424; *Salmon v. Bennett*, 1 Conn. 525; *Reade v. Livingston*, 3 Johns. Ch. 500; *Mercer v. Mercer*, 29 Iowa, 597; *Doe v. Hurd*, 1 Blackf. 510; *Bullitt v. Taylor*, 34 Miss. 708; *Lerow v. Wilmarth*, 9 Allen, 380; *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199.

is not even a good consideration passing between the parties, the conveyance is presumptively void as against the existing creditors, *i.e.*, those who were already creditors at the time of the conveyance.<sup>1</sup> But if a voluntary conveyance is made to a wife and child, and at the time of the conveyance sufficient property was left in the hands of the grantor to amply secure existing creditors, the conveyance will nevertheless be presumptively good against the creditors. But if the grantor is insolvent at the time of conveyance, it may be avoided by the existing creditors.<sup>2</sup> But this presumption which is sometimes called *constructive fraud*, because no actual fraud is required to be established,<sup>3</sup> — is not a conclusive presumption of fraud or bad faith, and it may be rebutted by positive evidence to the contrary.<sup>4</sup> The existence of a fraudulent intent is a question for the jury, to be determined upon a consideration of all the facts of each case,<sup>5</sup> and the burden of proof is on the party alleging the fraudulent intent.<sup>5</sup>

Although it is doubtful, according to the authorities,

<sup>1</sup> *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Lerow v. Wilmarth*, 9 Allen, 386; *Reade v. Livingston*, 3 Johns. Ch. 500; *Salmon v. Bennett*, 1 Conn. 525; *Washband v. Washband*, 27 Conn. 424; *Doe v. Hurd*, 7 Blackf. 510; *Mercer v. Mercer*, 29 Iowa, 557; *Bullitt v. Taylor*, 34 Miss. 708.

<sup>2</sup> *Lerow v. Wilmarth*, 9 Allen, 386; *Pomeroy v. Bailey*, 43 N. H. 118; *Van Wyck v. Seward*, 6 Paige, 62; *Baker v. Bliss*, 39 N. Y. 70; *Posten v. Posten*, 4 Whart. 42; *Miller v. Pearce*, 6 Watts & S. 101; *Gridley v. Watson*, 53 Ill. 193; *Bridgford v. Riddel*, 55 Ill. 261; *Pratt v. Myers*, 56 Ill. 24; *Stewart v. Rogers*, 25 Iowa, 395; *Baldwin v. Tuttle*, 23 Iowa, 74.

<sup>3</sup> *Reade v. Livingston*, 3 Johns. Ch. 481; *Wadsworth v. Havens*, 3 Wend. 412; *Early v. Owens*, 68 Ala. 171.

<sup>4</sup> *Lerow v. Wilmarth*, 9 Allen, 386; *Hinde v. Longworth*, 11 Wheat. 199; *Genesee River Bank v. Mead*, 92 N. Y. 637.

<sup>5</sup> *Jackson v. Mather*, 7 Cow. 801; *Jamison v. King*, 50 Cal. 132; *Harris v. Burns*, 50 Cal. 140; *Clark v. Morrill*, 21 Up. Can. Q. B. 600; 5 Up. Can. Q. B. 561.

<sup>6</sup> *Elliott v. Stoddard*, 98 Mass. 145; *Erb v. Cole*, 31 Ark. 554; *Morgan v. Olvey*, 53 Ind. 6; *Jewett v. Cook*, 81 Ill. 260; *Tompkins v. Nichols*, 53 Ala. 197.

whether subsequent creditors can claim any benefit from the avoidance of a transfer of property on account of constructive fraud upon creditors, where the action for avoidance is brought by a contemporaneous creditor, there being authority in support of both the affirmative<sup>1</sup> and the negative<sup>2</sup> sides of the proposition; yet, it is settled that the subsequent creditor cannot take the initiative in avoidance of the transfer, unless it has been made with an actual fraudulent intent;<sup>3</sup> and this intent must be shown to defraud the subsequent creditors.<sup>4</sup> When an intent to defraud subsequent creditors is established, the transfer may be avoided by subsequent as well as by existing creditors.<sup>5</sup> It would thus be a fraud against subsequent creditors for one to transfer property to another without consideration, in anticipation of incurring greater liabilities or of embarking in an unusually hazardous business or speculation, whereby the available assets of the debtor are appreciably diminished.<sup>6</sup>

<sup>1</sup> *Spirett v. Willows*, 3 De Gex, J. & S. 293; *Bonazina v. Leed*, 3 Low. Can. 446; *Carter v. Grimshaw*, 49 N. H. 100; *McLane v. Johnson*, 43 Vt. 48; *Bank v. Rattenberg*, 7 Grant (Ont.), 383.

<sup>2</sup> See *Shand v. Hanley*, 71 N. Y. 319; *Snyder v. Christ*, 39 Pa. St. 499; *Monroe v. Smith*, 79 Pa. St. 459; *Dorley v. McKiernan*, 62 Ala. 34; *Lloyd v. Bunce*, 41 Iowa, 660; *Sanders v. Chandler*, 26 Minn. 273; *Lehberg v. Biberstein*, 51 Tex. 457; *Harlin v. Maglaughlan*, 90 Pa. St. 293; *Mullen v. Wilson*, 44 Pa. St. 413; *Arrowsmith v. O'Sullivan*, 44 N. Y. Supt. Ct. 573.

<sup>3</sup> *Thacher v. Phinney*, 7 Allen, 150; *Beal v. Warren*, 2 Gray, 447; *Trafton v. Hawes*, 102 Mass. 541; *Lormore v. Campbell*, 60 Barb. 62; *Stone v. Myers*, 9 Minn. 811; *Sexton v. Wheaton*, 8 Wheat. 229; *Howe v. Ward*, 4 Greenl. 195.

<sup>4</sup> *Winchester v. Charter*, 12 Allen, 606; 97 Mass. 106.

<sup>5</sup> *Marston v. Marston*, 54 Me. 476; *Parkman v. Welch*, 19 Pick. 281; *Coolidge v. Melvin*, 42 N. H. 521; *Redfield v. Buck*, 85 Conn. 329; *Paulk v. Cooke*, 39 Conn. 566; *Van Wyck v. Seward*, 6 Paige, 62; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 164; *Williams v. Davis*, 69 Pa. St. 21; *Bridgford v. Riddel*, 55 Ill. 261; *Herschfeldt v. George*, 6 Mich. 466; *Bullitt v. Taylor*, 34 Miss. 740; *Pratt v. Myers*, 56 Ill. 24.

<sup>6</sup> *Thacher v. Phinney*, 7 Allen, 146; *Wadsworth v. Williams*, 100 Mass.



In order that, in any case, a sale may be avoided by creditors, it is held that the thing sold must be subject to levy and sale under execution. The conveyance of property which is exempted from levy under the homestead and exemption law cannot be avoided by creditors for being voluntary, at least according to most of the authorities.<sup>1</sup> But there are cases which hold to the contrary, viz.: that the voluntary conveyance to a third person without consideration is an act of abandonment, a fraud upon creditors, and the creditors may attach the property in the hands of the grantee.<sup>2</sup>

§ 175. **Preferences by insolvents in transfer of property in payment of debts, when fraudulent — Voluntary assignments for benefit of creditors.** — In pursuance of the general rule, already explained in preceding paragraph, viz.: that the transfer of goods by an insolvent is never presumed to be fraudulent, where it is supported by a valuable and substantial consideration, it is very generally held that there is no implied fraud, where a debtor makes a transfer of his property or a part of it, to one or more creditors, in payment of their claims, to the exclusion of other creditors, who, on account of the want of sufficient assets of the debtor, are thereby left without an equivalent

126; *Dood v. Adams*, 125 Mass. 398; *Kirksey v. Snedecor*, 60 Ala. 192; *Mattingly v. Nye*, 8 Wall. 370; *Graham v. Railroad Co.*, 102 U. S. 153; *Smith v. Hodges*, 92 U. S. 183; *Sexton v. Wheaton*, 8 Wheat. 229; *Carpenter v. Carpenter*, 25 N. J. Eq. 194; *Day v. Cooley*, 118 Mass. 524; *Winchester v. Charter*, 12 Allen, 606; *Beal v. Warren*, 2 Gray, 447; *Pelham v. Aldrich*, 8 Gray, 515; *Carpenter v. Roe*, 10 N. Y. 227; *Babcock v. Eckler*, 24 N. Y. 623; *Dygert v. Remerschnider*, 32 N. Y. 648.

<sup>1</sup> *Gassett v. Grant*, 4 Met. 490; *Danforth v. Beattie*, 43 Vt. 138; *Wood v. Chambers*, 20 Tex. 254; *Dreutzer v. Bell*, 11 Wis. 114. See, also, *Winebrenner v. Weisinger*, 3 B. Mon. 33; *Dearman v. Dearman*, 4 Ala. 521; *Planters' Bank v. Henderson*, 4 Humph. 75; *Legro v. Lord*, 10 Me. 161; *Vaughan v. Thompson*, 17 Ill. 78; *Foster v. McGregor*, 11 Vt. 595; *Garrison v. Monaghan*, 33 Pa. St. 232.

<sup>2</sup> *Currier v. Sutherland*, 54 N. H. 475 (20 Am. Rep. 143).

remedy. At common law, this is not only the rule where the goods are transferred directly to a particular creditor or number of creditors,<sup>1</sup> but also, where the transfer is made to a trustee, in trust for the benefit of a number of creditors, and in satisfaction of their claims, to the exclusion of others.<sup>2</sup> And in such an assignment for the benefit of creditors, although there are many cases to the contrary<sup>3</sup> it has been held to be lawful for a debtor to stipulate that the acceptance of a benefit under the assignment by a creditor must be conditional upon his release of the creditor's claim for the remainder of the debt, which is left unpaid after a *pro rata* division of the property in the hands of the assignee.<sup>4</sup> It would, however, be a fraud, which would

<sup>1</sup> King v. Watson, 3 Price, 6; Buffum v. Green, 5 N. H. 71; Wall v. Lakin, 13 Met. 167; Deforest v. Bacon, 2 Conn. 683; Hendricks v. Robinson, 2 Johns. Ch. 308; Grover v. Wakeman, 11 Wend. 194; Wilt v. Franklin, 1 Binn. 502; Bruce v. Smith, 3 Harr. & J. 499; Moffatt v. McDowell, 1 McCord Eq. 484; United States v. Bank, 8 Rob. (La.) 262; Fusset v. Traber, 20 Ohio, 540; Marbury v. Brooks, 7 Wheat. 556; Brashear v. West, 7 Pet. 608; Brown v. Minturn, 2 Gall. (U. S.) 557; Ford v. Williams, 3 B. Mon. 550; Stover v. Herrington, 7 Ala. 142; King v. Trice, 3 Ired. Eq. 567; Waters v. Comly, 3 Harr. 117; Leitch v. Hallister, 4 N. Y. 211; Nicoll v. Mumford, 2 Johns. Ch. 529; Bates v. Coe, 10 Conn. 280; Stevens v. Bell, 6 Mass. 339; Johnson v. Whitwell, 7 Pick. 74; Pickstock v. Lyster, 3 Maule & S. 371.

<sup>2</sup> Holbird v. Anderson, 5 T. R. 285; Haven v. Richardson, 5 N. H. 113; Ingraham v. Wheeler, 6 Conn. 277; Halsey v. Whitney, 4 Mason, 211; Clark v. Peter, 12 Pet. 178; Tompkins v. Wheeler, 16 Pet. 106; Burd v. Smith, 4 Dall. 85; Murray v. Riggs, 15 Johns. 571; Stevens v. Bell, 6 Mass. 342; Pickstock v. Lyster, 3 Maule & S. 371.

<sup>3</sup> Holding that the assignment must be free from conditions, in order to escape being fraudulent. Searing v. Brinkerhoff 5 Johns. Ch. 329; Hyslop v. Clarke, 14 Johns. 459; Ingraham v. Geyer, 13 Mass. 146; Harris v. Sumner, 2 Pick. 129; Wakeman v. Grover, 4 Paige Ch. 28; Armstrong v. Byrne, 1 Edw. Ch. 79; Atkinson v. Jordan, 5 Ohio, 178; Johnson v. Farnam, 56 Ga. 144; Robins v. Embry, 1 Sm. & M. 208; Wilde v. Rawlings, 1 Head, 84; Brown v. Knox, 6 Mo. 302; Hafner v. Irwin, 1 Ired. L. 490; Miller v. Conklin, 17 Ga. 430; Mills v. Levy, 2 Edw. Ch. 188; Austin v. Bell, 20 Johns. 442.

<sup>4</sup> Hatch v. Smith, 5 Mass. 42; Hewlett v. Cutler, 187 Mass. 285; King v. Watson, 3 Price, 6; Skipwith v. Cunningham, 8 Leigh, 271; Small v.

vitiate the whole transaction, if some of the creditors are induced to sign a release under the assignment, in consideration of receiving a secret payment of a part or the whole of the balance left unpaid by the distribution under the assignment.<sup>1</sup> It would, also, be fraudulent, in a deed requiring a release of the balance of the debt as a condition precedent to sharing in the benefits of the assignment, to provide for the return of the surplus to the grantor,<sup>2</sup> whereas such a provision for a return of the surplus to the grantor after a settlement of all the debts is unobjectionable in a general and absolute assignment for the equal benefit of all creditors, and one which will be implied by the law if it is not expressly made.<sup>3</sup> But this is only permissible, where the assignment is for the benefit of all the creditors,<sup>4</sup> it being required wherever such an assignment is valid, that the rest of the property must go to the creditors not provided for under the provisions of the assignment.<sup>5</sup>

Marwood, 9 B. & C. 300; Dockray v. Dockray, 2 R. I. 547; Porter v. Williams, 5 Seld. 142; Allen v. Gardner, 7 R. I. 22; Hindman v. Dill, 11 Ala. 689; Pfelfer v. Dargan, 14 S. C. 44; Gordon v. Cannon, 18 Gratt. 387; Austin v. Johnson, 7 Humph. 191; Robinson v. Rapelye, 2 Stew. 86; Stewart v. Spencer, 1 Curt. C. C. 157; Keating v. Vaughan, 61 Tex. 518; Ramsdell v. Sigerson, 2 Gill, 78; Ely v. Hair, 16 B. Mon. 208; Grimshaw v. Walker, 12 Ala. 101; D'Ivernois v. Leavitt, 23 Barb. 63; Barney v. Griffin, 4 Sandf. 552; Goss v. Neale, 5 Moore, 29; Halsey v. Whitney, 4 Mason, 230.

<sup>1</sup> 1 Story Eq. Jur., § 378, and cases there cited; Spurrutt v. Spiller, 1 Atk. 105; Chesterfield v. Janssen, 1 Atk. 352; Smith v. Bromley, Dougl. 696.

<sup>2</sup> Grimshaw v. Walker, 12 Ala. 101; Rankin v. Lodor, 21 Ala. 380; West v. Snodgrass, 17 Ala. 549; Clayton v. Johnson, 36 Ark. 406; McCall v. Hinckley, 4 Gill, 128; Whedbee v. Stewart, 40 Md. 414; Maughlin v. Tyler, 47 Md. 545.

<sup>3</sup> Halsey v. Whitney, 4 Mason, 222; Van Rossum v. Walker, 11 Barb. 237; Curtis v. Leavitt, 15 N. Y. 120; Potter v. Paige, 54 Pa. St. 465; Hall v. Denison, 17 Vt. 310.

<sup>4</sup> Barney v. Griffin, 2 N. Y. 365; Leitch v. Hollister, 4 N. Y. 211.

<sup>5</sup> Ely v. Hair, 16 B. Mon. 230; Miller v. Stetson, 32 Ala. 161; Bank v. Gorman, 8 W. & S. 304; N. A. & S. R. v. Huff, 19 Ind. 444; Burgin v. Burgin, 1 Ired. L. 453.

But the United States bankrupt laws, whenever they have been in force subject the whole matter of preferential settlements with creditors to statutory regulations, which are designed to secure an equitable distribution among the creditors, and some of the State insolvent laws<sup>1</sup> go the length of prohibiting all preferential assignments and transfers of property to creditors, whether they are made indirectly to an assignee or directly to the creditor in payment of his claim.<sup>2</sup> It is, however, the general rule in this country that a debtor in failing circumstances may, by transfers of property, at least in any other mode than by assignments in trust, settle the claims of one or more creditors to the exclusion of others, wherever there is an honest intention to pay a *bona fide* debt.<sup>3</sup> And such a transfer was held to be valid under the late national bankrupt law, as well as under many of the State insolvent laws, as long as it was not made when both seller and buyer contemplated a speedy assignment in bankruptcy.<sup>4</sup>

<sup>1</sup> See *Berry v. Cutts*, 42 Me. 455; *Varnum v. Camp*, 1 Greenl. 326; *Brown v. Lee*, 7 Ga. 267; *Bryan v. Burbin*, 26 Mo. 423; *Gari v. Hill*, 1 Stock. Ch. 210; *Brown v. Holcomb*, 1 Stock. 297.

<sup>2</sup> There are statutes to that effect in Alabama, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin. In some of the States, the statutes simply nullify the preferential provision instead of invalidating the whole assignment. *Henderson v. Pierce*, 9 N. E. Rep. 449; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Nelson v. Garey*, 15 Neb. 531; *Smith v. Bowen*, 61 Wis. 258.

<sup>3</sup> *York Co. Bank v. Carter*, 38 Pa. St. 446, 453; *Covanhovan v. Hart*, 21 Pa. St. 495; *Tompkins v. Wheeler*, 16 Pet. 118; *Marbury v. Brooks*, 7 Wheat. 556; 11 Wheat. 78; *Ferguson v. Spear*, 65 Me. 277; *Clarke v. White*, 21 Pet. 178; *Whitehead v. Woodruff*, 11 Bush, 209; *Hill v. Bowman*, 35 Mich. 191; *Fleischer v. Dignon*, 53 Iowa, 288; *Butler v. White*, 25 Minn. 432; *Blennerhassett v. Sherman*, 105 U. S. 117; *Gage v. Cheesbro*, 49 Wis. 494; *Beurman v. Van Buren*, 44 Mich. 496; *Eldridge v. Phillipson*, 58 Miss. 270; *Dudley v. Danforth*, 61 N. Y. 626; *Smith v. Skeary*, 47 Conn. 47, 54; *Brigham v. Fawcett*, 42 Mich. 542; *Gaus v. Renshaw*, 2 Pa. St. 36.

<sup>4</sup> *Lincoln v. Wilbur*, 125 Mass. 249; *Hauselt v. Vilmar*, 76 N. Y. 630;

But, in every case, where the transfer is ostensibly for the purpose of paying an honest debt, but actually to hinder and defraud creditors, while the goods continue secretly to be the property of the debtor, the transfer is, of course, fraudulent, and the creditors may avoid it and proceed against the property.<sup>1</sup>

§ 176. **Conflicting claims of vendor and vendee's creditors.** — As soon as the title of the goods has passed to the vendee, his creditors have a right to the goods as a part of the debtor's assets; and if the vendee redelivers the goods to the vendor, it constitutes a preferential satisfaction of a debt, and is fraudulent or not, in accordance with the general principles set forth in the preceding two sections.<sup>2</sup> Thus, it would be a preference to the vendor as a creditor, if the goods were returned to him after the vendee had acquired absolute possession of the goods;<sup>3</sup> whereas, it is not a preference of a creditor for the vendee to return the goods, or allow the vendor time enough to exercise his right of *stoppage in transitu*, before the goods have come into the

Getman v. Oswego Bank, 23 Hun, 498; Bentz v. Rockey, 69 Pa. St. 76; Jones v. Sayer, 52 Md. 211; Sife v. Earman, 26 Gratt. 566; Fraser v. Thatcher, 49 Tex. 26; Gardner v. Commercial Bank, 95 Ill. 298; Grant v. National Bank, 97 U. S. 80; Barbour v. Priest, 103 U. S. 298; Gottwalls v. Mulholland, 15 Up. Can. C. P. 62; Rish v. Sherman, 21 Grant Ch. (Ont.) 250; Blennerhassett v. Sherman, 105 U. S. 100; Rogers v. Palmer, 102 U. S. 263; Auffin'ordt v. Raisin, 102 U. S. 620; Van Patten v. Burr, 52 Iowa, 518; Scott v. Alford, 53 Tex. 82; Eldridge v. Phillipson, 58 Miss. 276; Dance v. Searman, 11 Gratt. 778; Zahn v. Fry, 10 Phila. 247; Frazier v. Fredericks, 24 N. J. L. 162; Guernsey v. Miller, 80 N. Y. 181; James v. Mechanics' Bank, 12 R. I. 460; Farwell v. Jones, 63 Iowa, 316; Perry v. Vezina, 63 Iowa, 25; Nelson v. Garey, 15 Neb. 531; Gallagher's App., 7 Atl. Rep. 237; Evans v. Winston, 74 Ala. 349.

<sup>1</sup> Roberts v. Radcliffe, 35 Kan. 502.

<sup>2</sup> §§ 174, 175.

<sup>3</sup> Barnes v. Freeland, 6 T. R. 80; Neate v. Ball, 2 East, 123; Richard-son v. Goss, 3 Bos. & P. 119; Helneckey v. Earle, 8 El. & B. 410; Atkins v. Barwick, 1 Stra. 165; 10 Mod. 432; Salts v. Field, 5 T. R. 211.

actual possession of the vendee.<sup>1</sup> In a preceding chapter, a full discussion is given of the question, when the transfer of title takes place.<sup>2</sup> To the sections of this chapter the reader is referred for a further pursuit of this inquiry, it being sufficient to say in this connection that the creditors of the vendee have an interest in the goods, as soon as the title has passed to the vendee.

§ 177. **Fraud on creditors, on account of vendor's retention of possession of goods.** — It has been shown elsewhere<sup>3</sup> when and how far the retention of possession of the goods by the vendor after a sale, will invalidate the sale on the ground of being a fraud on creditors and subsequent purchasers. It will, therefore, be unnecessary to do more here than to refer the reader to the preceding section.

<sup>1</sup> *Atkins v. Barwick*, 10 Stra. 165; *Smith v. Field*, 5 T. R. 402; *Whitehead v. Anderson*, 9 M. & W. 529; *Bartram v. Farebrothers*, 4 Bing. 579; *Bolton v. Lancashire, &c., R. Co.*, L. R. 1 C. C. 481; 35 L. J. C. P. 137.

<sup>2</sup> See *ante*, ch. VII.

<sup>3</sup> See *ante*, § 84a.

## CHAPTER XIV.

### WARRANTY.

- SECTION 180.** Warranty defined and distinguished from other liabilities.
181. The consideration of a warranty.
182. Kinds of warranties — Express and implied — Of title and quality.
183. Power of agent to bind principal by warranties.
184. Express warranty of title.
185. Implied warranty of title.
186. How and when the warranty of title is broken.
187. Implied warranty of quality — When there is and is not an opportunity for inspection of goods.
188. Sales by sample.
189. Identity of kind — Sales by description.
190. Implied warranty of merchantability — Manufacturer's liability — Fitness for a particular use.
191. Implied warranty in sales of provisions.
192. Effect of usage on implied warranties of quality.
193. Forms of express warranties — Affirmations and expressions of opinion — Express warranties distinguished from fraud.
194. Interpretation of warranties — Unsoundness in animals — Warranties as to future conditions.
195. Express warranties in relation to patent or obvious defects.
196. Written and oral warranties.
197. Remedies for the breach of warranty.

§ 180. **Warranty defined and distinguished from other liabilities.** — Warranty, which is a synonym of guaranty, is an agreement, express or implied, to be responsible for all damages, if a statement or assurance of a fact eventually proves to be false.<sup>1</sup> When the assurance is that a certain

<sup>1</sup> See *Neave v. Arntz*, 56 Wis. 174; *Jones v. George*, 61 Tex. 345; *Dorr v. Fisher*, 1 Cush. 273; *Cary v. Gruman*, 4 Hill, 626; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Reynolds v. Palmer*, 21 Fed. Rep.

debt will be paid, it is called a guaranty; when it relates to the title or quality of property, it is called a warranty. Although the warranty, express or implied, is a common accompaniment of the contract of sale, it is only collateral to it, and is in no sense a necessary part of it.<sup>1</sup>

It is to be distinguished from fraud, in that the gravamen of fraud is the deceit; whereas, in warranties, the liability rests upon an express or implied agreement to be responsible for the consequences of a material misrepresentation, irrespective of any intention to deceive. Actions on the warranty are necessarily *ex contractu*: while actions for fraud may be, at the option of the party defrauded, either *ex contractu* or *ex delicto*.<sup>2</sup> But if the misrepresentation is accompanied by a fraudulent intent to deceive, it may support an action for fraud, as well as an action for breach of the warranty.<sup>3</sup>

The warranty is also to be distinguished from a condition, in that the breach of the warranty simply gives rise to an action for damage; whereas the entire contract, is suspended or avoided by the breach of the condition, which is annexed to it,<sup>4</sup> although the warranty is sometimes treated as a condition precedent for the purpose of avoiding circuitry of action.<sup>5</sup>

439, note; *Harley v. Iron Works*, 66 Cal. 238; *Chanter v. Hopkins*, 4 M. & W. 404.

<sup>1</sup> *McFarland v. Newman*, 9 Watts, 55.

<sup>2</sup> *Bostwick v. Lewis*, 1 Day, 250; *Dye v. Wall*, 6 Ga. 584; *Wardell v. Fosdick*, 13 Johns. 325; *Waterbury v. Russell*, 8 Baxt. 159; *Clark v. Bamer*, 2 Lans. 67; *Larey v. Tallafarro*, 57 Ga. 448; *Vail v. Strong*, 10 Vt. 457; *Hillman v. Wilcox*, 30 Me. 170. It is not necessary to prove deceit in an action of warranty, even where it has been alleged. *Shippen v. Bowen*, 122 U. S. 575.

<sup>3</sup> *Hughes v. Funston*, 23 Iowa, 257. See *Sherman v. Johnson*, 56 Barb. 59; *Rose v. Hurley*, 39 Ind. 77.

<sup>4</sup> *Dorr v. Fisher*, 1 Cush. 273.

<sup>5</sup> See *Boardman v. Spooner*, 13 Allen, 361; *Dorr v. Fisher*, 1 Cush. 273; *Morse v. Brackett*, 98 Mass. 200. As to right to rescind the contract, restore the property and recover the price for the breach of a warranty, see *post*, § 197.



Although it has been held that a warranty cannot be effective, except in connection with the executed contract of sale<sup>1</sup> and although this is true, so far that an action for damages cannot be maintained for the breach of the warranty, until the property has passed to the purchaser,<sup>2</sup> and the contract is thus executed, the warranty is still effective before execution of the sale, in that its breach or avoidance furnishes to the buyer a justification or defense for refusing to accept the goods.<sup>3</sup>

§ 181. **The consideration of a warranty.** — A warranty, being a contract, is not binding, unless it is supported by some valuable consideration. If made at the time or as a part of the contract of sale, the price of the goods will be the consideration alike of the contract to sell and of the warranty. And this is the case whether the warranty was made some time before the making of the contract of sale, provided it operated as an inducement to make the purchase<sup>4</sup> or whether it was made after the making of the contract, provided it is made before the completion of the details.<sup>5</sup> But if the warranty is made after the completion of the contract of sale, then it is not valid or binding on the seller, unless it is supported by some new and independent consideration.<sup>6</sup> But any slight though material consideration will suffice, such as a waiver of the right of rejection of the goods, because they were not delivered in

<sup>1</sup> *Osborn v. Gantz*, 60 N. Y. 549; *Harley v. Iron Works*, 66 Cal. 238.

<sup>2</sup> *Frye v. Milligan*, 10 Ont. 509.

<sup>3</sup> See *Polhemus v. Helman*, 45 Cal. 573; *Maxwell v. Lee*, 27 N. W. Rep. 196; *Foot v. Bentley*, 44 N. Y. 166; *Day v. Pool*, 52 N. Y. 416; *Parks v. Morris, &c., Co.*, 54 N. Y. 586; *Brigg v. Hilton*, 99 N. Y. 517; *Kent v. Friedman*, 3 N. E. Rep. 905; *Gibson v. Stevens*, 8 How. 334.

<sup>4</sup> *Willmot v. Hurt*, 11 Wend. 584.

<sup>5</sup> *Vincent v. Leland*, 100 Mass. 432.

<sup>6</sup> *Bryant v. Crosby*, 40 Me. 9; *James v. Bocage*, 45 Ark. 284; *Bloss v. Kittridge*, 5 Vt. 28; *Summers v. Vaughn*, 35 Ind. 323; *Morehouse v. Comstock*, 42 Wis. 626; *Grant v. Cadwell*, 8 Up. Can. Q. B. 161; *Towell v. Gatewood*, 2 Scam. 24; *Hogins v. Plympton*, 11 Pick. 99.

time.<sup>1</sup> And if a warranty had been promised during the negotiations for the sale, it would be supported by the same consideration with the contract of sale, and would need no independent consideration, although the warranty was actually written after the completion of the contract.<sup>2</sup>

This question of consideration can only arise in respect to express warranties, for, manifestly, implied warranties would arise in connection with, and as a part of, the contract of sale, and would therefore always be supported by the consideration of the primary contract.

§ 182. **Kinds of warranties — Express and implied — Of title and of quality.** — A warranty may be express or implied. It is express, when the seller actually assures the buyer of the existence or non-existence of a fact, and implied, when the law deduces or infers that assurance from the execution of the contract of sale.<sup>3</sup> But an implied warranty only arises when there is no express warranty; hence an express warranty will always exclude an implied one,<sup>4</sup> even where the express warranty relates to one quality, and the implied warranty has reference to another and independent quality.<sup>5</sup> But if the express warranty relates to a quality, it will not exclude an implied warranty of title; nor *vice versa*. There is no contradiction between such express and implied warranties.<sup>6</sup>

<sup>1</sup> Congar v. Chamberlain, 14 Wis. 258; Porter v. Pool, 62 Ga. 238.

<sup>2</sup> Cole v. Weed, 68 Wis.

<sup>3</sup> Borrekens v. Bevan, 3 Rawle, 23; Otts v. Alderson, 10 Sm. & M. 476; Terhune v. Dever, 36 Ga. 648; Osgood v. Lewis, 2 Har. & G. 405; Neave v. Arntz, 56 Wis. 174.

<sup>4</sup> McGraw v. Fletcher, 35 Mich. 104; Lainer v. Auld, 1 Murph. 138; Jackson v. Langston, 61 Ga. 392. See Houston v. Gilbert, 3 Brev. 63; Boothby v. Scales, 27 Wis. 683; Merriam v. Field, 24 Wis. 640.

<sup>5</sup> Jackson v. Langston, 61 Ga. 392; Baldwin v. Van Deusen, 37 N. Y. 487; McGraw v. Fletcher, 35 Mich. 104; Mullain v. Thomas, 43 Conn. 252; Dening v. Foster, 42 N. H. 175; International Pavement Co. v. Smith, 17 Mo. App. 264.

<sup>6</sup> See Wells v. Spears, 1 McCord, 421; Wood v. Ashe, 3 Strobb. 64; Trimmer v. Thomson, 10 S. C. 164.

Warranties are also divisible into warranties of title and of quality. And under warranties of quality are included warranties of identity of the property. They will be discussed in succeeding paragraphs. Suffice it to say here, generally, that both classes of warranties, of title and of quality, may be either express or implied.

§ 183. **Power of agent to bind principal by warranties.** — Since implied warranties are involuntary incidents of the contract of sale, no question can arise as to the power of agents to bind their principals by them; for if the agent has the power to sell, the warranty will be implied from the sale. And if the express warranty is nothing more than what the law will imply, the principal would be bound by it, as, for example where the agent undertakes to warrant conformity of the goods to sample.<sup>1</sup>

But where the agent undertakes without express authority to warrant goods which he sells, where there would be no implied warranty, it is very different, and the authorities are somewhat conflicting. While there are a few cases, which seem to hold that a general agent to sell will have the implied power to warrant, in the absence even of a general custom to warrant,<sup>2</sup> the better opinion is that neither a general agent<sup>3</sup> nor a special agent,<sup>4</sup> has the power

<sup>1</sup> *Murray v. Smith*, 4 Daly, 277; *Schuchardt v. Allens*, 1 Wall. 359; *Dayton v. Hooglund*, 39 Ohio St. 671; *Andrews v. Kneeland*, 6 Cow. 354.

<sup>2</sup> See *Deming v. Chase*, 48 Vt. 382; *Boothby v. Scales*, 27 Wis. 635; *Flatt v. Osborne*, 33 Minn. 98; *Talmage v. Bierhause*, 108 Ind. 270; *Murray v. Brooks*, 41 Iowa, 45.

<sup>3</sup> *Smith v. Tracy*, 36 N. Y. 79; *Anderson v. Bruner*, 112 Mass. 14; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Palmer v. Hatch*, 46 Mo. 385; *Herring v. Skaggs*, 73 Ala. 446.

<sup>4</sup> *Cooley v. Ferrine*, 41 N. J. L. 322; 42 N. J. L. 623; *Scott v. McGrath*, 7 Barb. 53; *Brady v. Todd*, 9 C. B. N. S. 592; *Decker v. Fredericks*, 47 N. J. L. 592. So also, in regard to auctioneers, *The Mount Allegre*, 9 Wheat. 647; *Blood v. French*, 9 Gray, 198; *Schell v. Stephens*, 50 Mo. 375; and to brokers, *Dodd to Farlow*, 11 Allen, 426; *Smith v. Tracy*, 36 N. Y. 89; *Graul v. Strutzel*, 53 Iowa, 712.

to warrant the goods which he sells, unless the power is expressly given him, or it is universally customary for such agents to give warranties. But if there is a general custom and usage of that kind, the power to warrant will be implied from the power to sell.<sup>1</sup> But if an express authority to warrant is given to the agent with limitations on the implied authority, and the purchaser knows that the agent has an express authority to warrant, he cannot hold the principal liable on any warranty which the agent might make outside of the express grant of authority.<sup>2</sup>

An unauthorized warranty may be subsequently ratified, but it will take something more than the receipt of the price in ignorance of the warranty being given, to constitute a ratification. It must be some act of express or implied confirmation done after the principal has become aware of the unauthorized warranty.<sup>3</sup>

In the case of expressly authorized warranties by agents, the authority to warrant must be proven satisfactorily and by competent testimony.<sup>4</sup>

<sup>1</sup> *McCormick v. Kelly*, 28 Minn. 135; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Bryant v. Moore*, 26 Me. 84; *Smith v. Tracy*, 36 N. Y. 39; *Murray v. Brooks*, 41 Iowa, 45; *Deming v. Chase*, 48 Vt. 382; *Huguley v. Norris*, 65 Ga. 666; *Palmer v. Hatch*, 46 Mo. 585; *Schuchardt v. Allens*, 1 Wall. 359; *Applegate v. Moffit*, 60 Ind. 104; *Ezell v. Franklin*, 2 Sneed, 236; *Dingle v. Hare*, 7 C. B. N. S. 145; *Ahern v. Goodspeed*, 72 N. Y. 108; *Herring v. Skaggs*, 62 Ala. 180; *Skinner v. Gunn*, 9 Fort. 305; *Gaines v. McKinley*, 1 Ala. (N. S.) 446; *Bradford v. Bush*, 10 Ala. 386; *Hunter v. Jameson*, 6 Ired. 252; *Croom v. Shaw*, 1 Fla. 211; *Victor, &c., Co. v. Rheinschild*, 25 Kans. 584; *Dayton v. Hooglund*, 39 Ohio St. 671; *Fay v. Richmond*, 48 Vt. 25; *Boothby v. Scales*, 27 Wis. 626; *Tice v. Gallup*, 2 Hun, 446; *Nelson v. Cowing*, 6 Hill, 386; *Randall v. Kehlor*, 60 Me. 37; *Leering v. Thorn*, 29 Minn. 120.

<sup>2</sup> *Wood Mowing, &c., Co. v. Crow*, 30 N. W. 609; 70 Iowa, 340.

<sup>3</sup> *Smith v. Tracy*, 36 N. Y. 39; *Combs v. Scott*, 12 Allen, 493.

<sup>4</sup> *Smiles v. Hobbs*, 2 N. E. Rep. (N. H.) 845; *Churchill v. Palmer*, 115 Mass. 310; *Vogel v. Osborne*, 32 Minn. 167; *Melby v. Osborne*, 33 Minn. 492; *Eadie v. Ashbaugh*, 43 Iowa, 519.

§ 184. **Express warranty of title.**—There may, of course, be an express warranty of title; and, as to real property, it is customary to have them, since, in the absence of statute, there is no implied covenant of title to real property, except in the deed of feoffment.<sup>1</sup> But, in respect to personal property, it is different. Express warranties of title to personalty are rare; but when they are given they exclude the implied warranty.<sup>2</sup> Any distinct affirmation or assertion of title in the vendor would amount to an express warranty.<sup>3</sup> And inasmuch as affirmations may be made by acts as forcibly as by words, it is held that the affirmation may be proof of any act which is inconsistent with a negation of the vendor's title.<sup>4</sup> But this brings us to the consideration of the

§ 185. **Implied warranty of title.**—According to the early English rule, it seems that the courts did not recognize any implied warranty of title to personal property any more than to real property, the doctrine *caveat emptor* applying without limitation to the title of both species of property.<sup>5</sup> But, as it has been justly observed by Baron Parke,<sup>6</sup> that may be accounted for, “on the ground that in the older days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market overt, where the title obtained by the buyer was good against everybody but the sovereign.” And if the old doctrine that there is no implied warranty of title to per-

<sup>1</sup> Tiedeman Real Prop., §§ 849, 857, 859.

<sup>2</sup> *Sims v. Marryatt*, 17 Q. B. 281; 20 L. J. Q. B. 454; *Long v. Anderson*, 62 Ind. 537.

<sup>3</sup> *Burgess v. Wilkinson*, 13 R. I. 646; *Adamson, Jarvis*, 4 Bing. 66.

<sup>4</sup> See *Eichholz v. Bannister*, 17 C. B. (N. S.) 708; *Sims v. Marryatt*, 17 Q. B. 281; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592; *Bagneley v. Hawley*, L. R. 2 C. P. 625; note to *Scott v. Hix*, 2 Sneed, 192.

<sup>5</sup> See *Morley v. Attenborough*, 2 Ex. 500; note to *Scott v. Hix*, 2 Sneed, 192.

<sup>6</sup> *Benjamin on Sales*, § 636.

sonalty obtains at all to-day, it is hedged in and "has been well eaten away" by numerous exceptions.<sup>1</sup> The authorities, both English and American, agree now that there are implied warranties of title in very many sales of personal property, and that there is no implied warranty of title in other sales. But they are not quite agreed from what facts or statements the warranty of title may be implied. They only agree in holding that, where the vendor professedly sells only whatever interest he might have in the property, and expressly or impliedly repudiates any intention of asserting his title to the goods, there can be no implied warranty of title; for his attitude towards the goods is inconsistent with the inference of a warranty of title.<sup>2</sup> And there is an equivalent negation of intention to warrant the title, where one sells the property of another, while acting in the capacity of sheriff, executors, mortgagees, assignees, trustees and guardians. There is no implied warranty of title in such sales.<sup>3</sup>

Inasmuch as the principles of the *market overt* were not recognized in this country, and consequently the necessity for a warranty of title was more strongly felt here than in

<sup>1</sup> Lord Campbell in *Sims v. Marryatt*, 17 Q. B. 281, 290.

<sup>2</sup> *Page v. Cowajee Eduljee*, L. R. 1 P. C. 127; *Bagneley v. Hawley*, L. R. 2 C. P. 625; *Hopkins v. Grinnell*, 28 Barb. 533; *Jones v. Hungerford*, 3 Met. 515; *First Nat. Bank v. Mass., &c., Co.*, 123 Mass. 330.

<sup>3</sup> *The Monte Allegro*, 9 Wheat. 616; *Sheppard v. Earles*, 18 Hun, 651; *Ricks v. Dillahunt*, 8 Port. 133; *Forsythe v. Ellis*, 4 J. J. Marsh. 298; *Bingham v. Maxey*, 15 Ill. 295; *Harrison v. Shanks*, 13 Bush, 620; *Bostwick v. Winton*, 1 Sneed, 525; *Hensley v. Baker*, 10 Mo. 157; *Hicks v. Skinner*, 71 N. C. 539; *Corwin v. Benham*, 2 Ohio St. 37; *Baker v. Arnot*, 67 N. Y. 448; *Neal v. Gillaspay*, 56 Ind. 451; *Mockbee v. Gardner*, 2 Harr. & G. 176; *Chapman v. Speller*, 14 Q. B. 621; *Bartholomew v. Warner*, 32 Conn. 98; *Fore v. McKenzie*, 58 Ala. 115; *Stephens v. Ellis*, 65 Mo. 456; *Storm v. Smith*, 43 Miss. 497; *Brunner v. Brennan*, 49 Ind. 98; *Hoe v. Sanborn*, 21 N. Y. 552; *Scott v. Hix*, 2 Sneed, 192; *Mechanics' Assn. v. O'Connor*, 29 Ohio St. 651; *Scranton v. Clark*, 39 N. Y. 220; *Blood v. French*, 9 Gray, 197. But such persons may make themselves liable on a positive affirmation or guaranty of title. *Johnston v. Barker*, 20 Up. Can. Q. B. 228.

England, the American courts repudiated the English doctrine, that there was no implied warranty of title in the sales of personal property; and in their effort to find a rule for indicating where there was an implied warranty of title, apparently determined to give a warranty of title, as near as may be, in every case in which the principles of the *market overt* would in England have afforded ample protection; and while there are a few cases which appear to lay down a different rule, recognizing an implied warranty of title in every sale of goods by the owner, where the seller fails to disclose the defects of the title, or to disclaim the warranty,<sup>1</sup> the weight of authority recognizes an implied warranty of title only in those sales, in which the seller has the actual or potential possession of the goods, the possession of the goods being the fact from which the warranty of title was implied.<sup>2</sup> But the possession, which is required

<sup>1</sup> See *McKnight v. Devlin*, 52 N. Y. 401; *Hoe v. Sanborn*, 21 N. Y. 552.

<sup>2</sup> *Ricks v. Dillahunt*, 8 Port. 134; *Williamson v. Sammons*, 34 Ala. 691; *Lindsay v. Lamb*, 24 Ark. 224; *Starr v. Anderson*, 19 Conn. 341; *Morris v. Thompson*, 85 Ill. 16; *Chism v. Woods, Hardin*, 581; *Scott v. Scott*, 2 A. K. Marsh, 215; *Richardson v. Tipton*, 2 Bush, 202; *Eldridge v. Wadleigh*, 3 Fairf. 372; *Huntingdon v. Hall*, 36 Me. 501; *Mockbee v. Gardner*, 2 Harr. & G. 176; *Matheny v. Mason*, 73 Mo. 677; *Donaldson v. Newman*, 9 Mo. App. 235; *Bucknam v. Goddard*, 21 Pick. 71; *Dorr v. Fisher*, 1 Cush. 278; *Brown v. Pierce*, 97 Mass. 46; *Hunt v. Sackett*, 31 Mich. 18; *Long v. Hickingbottom*, 28 Miss. 772; *Sargent v. Currier*, 49 N. H. 310; *Wood v. Sheldon*, 42 N. J. L. 421; *Heermance v. Vernoy*, 6 Johns. 5; *Swett v. Colgate*, 20 Johns. 196; *Rew v. Barber*, 3 Cow. 272; *Burt v. Dewey*, 40 N. Y. 283; *McCoy v. Archer*, 3 Barb. 323; *Darst v. Brockway*, 11 Ohlo. 462; *Swazey v. Parker*, 50 Pa. St. 441; *Whitaker v. Eastwick*, 75 Pa. St. 229; *People's Bank v. Kuatz*, 99 Pa. St. 344; *Colcocke v. Goode*, 3 McCord, 513; *Trigg v. Faris*, 5 Humph. 343; *Bank v. Bank*, 10 Vt. 145; *Patee v. Pelton*, 48 Vt. 182; *Byrnside v. Burdett*, 15 W. Va. 702; *Lane v. Romer*, 2 Chand. 61; *Croninger v. Paige*, 48 Wis. 229; *Edgerton v. Michels (Wis.)*, 34 Am. Law Rep. 260, note; *Costigan v. Hawkins*, 22 Wis. 74; *Gilchrist v. Hilliard*, 53 Vt. 592; *Thrall v. Newell*, 19 Vt. 202; *Gookin v. Graham*, 5 Humph. 480; *Word v. Caven*, 1 Head, 507; *Hrumbhaer v. Birch*, 33 Pa. St. 426; *Flynn v. Allen*, 57 Pa. St. 482; *McCabe v. Morehead*, 1 Watts & S. 513; *Griffen v. Baird*, 62 N. Y. 329; *McKnight v. Devlin*, 52 N. Y. 401; *Hoe v. Sanborn*, 21 N. Y. 556; *Case*

by this rule to be in the seller, in order to raise the implication of a warranty of title, need not be actual. It is sufficient, if the goods be in the potential possession of the seller, i.e., that they are in the possession of some one as agent or bailee, and consequently can be brought into the actual possession of the seller whenever this is necessary or desirable.<sup>1</sup> But if the goods are in the possession of another who claims them as his own absolute property, there is neither actual nor constructive possession in the seller, and hence no implied warranty of title in his sale of them, for it is presumed that the seller is only offering his interest in the goods.<sup>2</sup> It is said, however, that possession in the seller and an implied warranty of title are always presumed.<sup>3</sup>

Mr. Bennett in his note to an edition of Benjamin on Sales,<sup>4</sup> maintains that very many of the cases, which are cited in support of the proposition that the warranty of title can be implied only from the seller's possession of the goods, do not lay down that rule, and that the judgments of the courts were rendered in these cases inde-

*v. Hall*, 24 Wend. 102; *Vibbard v. Johnson*, 19 Johns. 73; *Inge v. Bond*, 3 Hawks, 101; *Wansler v. Messler*, 29 N. J. L. 256; *Storm v. Smith*, 43 Miss. 497; *Davis v. Nye*, 7 Minn. 414; *Shattuck v. Green*, 104 Mass. 42; *Whitney v. Haywood*, 6 Cush. 86; *Bennett v. Bartlett*, 6 Cush. 225; *Coolidge v. Brigham*, 1 Met. 551; *Emerson v. Brigham*, 10 Mass. 202; *Dryden v. Kellogg*, 2 Mo. App. 87; *Rice v. Forsyth*, 41 Md. 389; *Thurston v. Spratt*, 52 Me. 202; *Butler v. Tufts*, 13 Me. 202; *Hale v. Smith*, 6 Greenl. 420; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Bayne v. Rodden*, 4 Bibb, 304; *Morris v. Thompson*, 85 Ill. 16; *Starr v. Anderson*, 19 Conn. 341; *Lindsay v. Lamb*, 24 Ark. 224; *Williamson v. Sammons*, 34 Ala. 691.

<sup>1</sup> *Whitney v. Heywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 45; *Huntingdon v. Hall*, 36 Me. 501.

<sup>2</sup> See *Jones v. Huggeford*, 3 Met. 519; *Bogert v. Christie*, 24 N. J. L. 57; *Whitney v. Heywood*, 6 Cush. 82; *Shattuck v. Green*, 104 Mass. 42; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Bank of Northampton v. Mass. Loan Co.*, 123 Mass. 330.

<sup>3</sup> *Long v. Hickingbottom*, 28 Miss. 772; *Scott v. Hix*, 2 Sneed, 192, note.

<sup>4</sup> Edition of 1888, pp. 616-619.



pendently of any consideration of this principle.<sup>1</sup> On the other hand, it is claimed in Story's Sales<sup>2</sup> that "this distinction (as to the implication of a warranty of title from the seller's possession) has now become so deeply rooted in the decisions of courts, in the dicta of judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated."<sup>3</sup> It is very likely true, that the distinction could not be easily eradicated; but there cannot be much doubt as to the unsoundness of the rule, that a warranty of title can only be implied from possession of the goods by the seller. A warranty of title may be, on principle, implied from any unequivocal act of absolute ownership of the goods. The having possession is an act of ownership; but it does not necessarily involve an assertion of absolute ownership; for one may have possession of goods as bailee or agent. But when one undertakes to sell goods, he does assert his dominion over the property, and exercise the power of an absolute owner, for no one else but the absolute owner of goods can give a good title, except in the few cases in which the sheriff, trustee, and other representative persons, are authorized to sell the goods of another. These cases being the exception to the general rule, the reasonable presumption is that when one undertakes to sell goods, without indicating the character in which he is offering to sell, he is selling his own goods, and not the goods of another.

Nor is the sale of goods any less an assertion of dominion over the goods, when the seller has not the posses-

<sup>1</sup> See *Andres v. Lee*, 1 Dev. & Bat. Eq. 318; *McCoy v. Artcher*, 8 Barb. 323; *Dresser v. Ainsworth*, 9 Barb. 620; *Edick v. Crim*, 10 Barb. 445; *Scott v. Hix*, 2 Sneed, 192; *Long v. Hickingbottom*, 28 Miss. 773; *Hopkins v. Grinnell*, 28 Barb. 537; *Scariton v. Clark*, 89 N. Y. 220; *Storm v. Smith*, 43 Miss. 497; *Sheppard v. Earles*, 18 Hun, 651; *Byrnside v. Burdett*, 15 W. Va. 702.

<sup>2</sup> § 367, p. 436, 4th ed.

<sup>3</sup> See also 2 Kent's Com., p. 478.

sion of them, even when the possession is in one who asserts an adverse title to the seller, unless the vendee knows of the adverse claim. If these propositions are sound, then the modern English rule is the correct one, viz.: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."<sup>1</sup>

The warranty of title will be implied whatever may be the character of the personal property which is offered for sale. The doctrine of an implied warranty of title extends not only to all kinds of goods, but also to all kinds of incorporeal personalty, such as *choses in action*, both negotiable and non-negotiable notes, bonds and open accounts,<sup>2</sup> corporate stock,<sup>3</sup> and patent rights.<sup>4</sup>

§ 186. **How and when the warranty of title is broken.**—The warranty of title amounts to an assurance that the seller has a *free* and *perfect* title. Hence the warranty is broken by the enforcement, if not the mere existence, of prior incumbrances, mortgages, pledges or liens.<sup>5</sup>

<sup>1</sup> Benjamin on Sales, § 639, p. 582. *Eichholz v. Bannister*, 17 C. B. N. S. 703; *Hall v. Conder*, 2 C. B. N. S. 22; *L'Apostre v. Le Plaistier*, cited in *Ryall v. Rowles*, 1 Ves. Tr. 351; *Ryall v. Rolle*, 1 Atk. 165. The English rule has been indorsed in Canada. *Brown v. Cockburn*, 37 Up. Can. Q. B. 592. But see *Somers v. O'Donohue*, 9 Up. Can. C. P. 208; *Johnston v. Barker*, 20 Up. Can. C. P. 228.

<sup>2</sup> *Flynn v. Allen*, 57 Pa. St. 482; *Boyd v. Anderson*, 1 Over. 438; *Swanzy v. Parker*, 50 Pa. St. 450; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205; *Porter v. Bright*, 82 Pa. St. 441; *Wood v. Sheldon*, 13 Vroom, 421; *Baker v. Arnot*, 67 N. Y. 448; *Gilchrist v. Hilliard*, 53 Vt. 592; *Donaldson v. Newman*, 9 Mo. App. 235. For a full discussion of the application of this principle to commercial paper, see *Tiedeman Commercial Paper*, §§ 244, 245, 259, 260.

<sup>3</sup> *People's Bank v. Kurtz*, 99 Pa. St. 344.

<sup>4</sup> *Darst v. Brockaway*, 11 Ohio, 462.

<sup>5</sup> *Dresser v. Ainsworth*, 9 Barb. 619; *Brown v. Cockburn*, 37 Up. Can.

It is, however, a much mooted question at what time the warranty may be considered broken, so that an action for the breach of the warranty may be brought. Some of the authorities hold that the warranty of title is broken by the existence of an outstanding superior title, and that the action for the breach of the warranty lies immediately and before there has been any eviction of the vendee.<sup>1</sup> But, other authorities maintain that the warranty is not broken until the outstanding superior title has been asserted, and something equivalent to an eviction of the vendee has occurred.<sup>2</sup>

Where the defect of title does in fact exist, the purchaser may buy up the outstanding claim or title and then recover of the vendor the amount he paid; and he need not wait until the holder of the claim against the property has asserted and enforced it.<sup>3</sup>

Q. B. 592; *Baker v. McAllister*, 3 Pac. Rep. 581; *Williamson v. Sammons*, 34 Ala. 691; *Linton v. Porter*, 81 Ill. 107; *Boyd v. Whitfield*, 19 Ark. 447; *Heermance v. Vernoy*, 6 Johns. 5; *McCoy v. Artcher*, 8 Barb. 323; *Vibbard v. Johnson*, 19 Johns. 78; *Willing v. Peters*, 12 Serg. & R. 181; *Tipton v. Triplett*, 1 Met. (Ky.) 570; *Bayse v. Briscoe*, 18 B. Mon. 474; *Dean v. Mason*, 4 Conn. 428; *Coolidge v. Brigham*, 1 Met. 551; *Doe v. Stanlon*, 1 M. & W. 701; *Chism v. Woods*, Hardin, 541; *Fawcett v. Osborn*, 32 Ill. 411; *Word v. Cavin*, 1 Head, 506; *Brown v. Pierce*, 97 Mass. 46.

<sup>1</sup> *Perkinson v. Whelan*, 116 Mass. 542; *Payne v. Rodden*, 4 Bibb, 304; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Dryden v. Kellogg*, 2 Mo. App. 87; *Matheny v. Mason*, 73 Mo. 677; *McCiffen v. Baird*, 62 N. Y. 329; *Word v. Caven*, 1 Head, 506; *Gross v. Hennessey*, 13 Allen, 389.

<sup>2</sup> *Sweetman v. Prince*, 62 Barb. 256; *Vibbard v. Johnson*, 19 Johns. 77; *Wanser v. Messler*, 29 N. J. L. 256; *Randon v. Toby*, 11 How. 498; *Burt v. Dewey*, 40 N. Y. 283; *Linton v. Porter*, 81 Ill. 107; *Gross v. Kierski*, 41 Cal. 111; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Case v. Hall*, 24 Wend. 102. In Kentucky it is held that an eviction is necessary where the warranty of title was express, but not where it is implied. *Tipton v. Triplett*, 1 Met. 570; *Scott v. Scott*, 2 A. K. Marsh. 215; *Payne v. Rodden*, 4 Bibb. 304; *Chancellor v. Wiggins*, 4 B. Mon. 202.

<sup>3</sup> *Sargent v. Currier*, 49 N. H. 310; *Harper v. Dotson*, 43 Iowa, 232; *Lane v. Romer*, 2 Chand. 61; *Burt v. Dewey*, 40 N. Y. 283; *Cahill v. Smith*, 4 N. E. Rep. 739; *Bordwell v. Colle*, 45 N. Y. 494; *McGiffen v.*

§ 187. **Implied warranty of quality** — When there is and is not an opportunity for inspection of goods. — The general rules of the English and American law look to the fostering of self-reliance in the individual, and nowhere does the common law furnish aid to the individual for the vindication or protection of his interests, if the individual can by the exercise of reasonable prudence protect himself. No one can protect himself efficiently against the fraud of the parties dealing with him; and hence ample remedies are provided for the overthrow of frauds. But in the ordinary relation of vendor and vendee, where neither party indulges in fraudulent misrepresentations, the parties are in a position to protect their own interests. They generally deal with each other at arm's length, and each relies upon his own judgment in determining whether to conclude or reject a sale. Hence the cardinal rule of the law of sales is embodied in the maxim *caveat emptor*; and it provides that there is ordinarily no warranty for the quality unless one is expressly demanded or given.

This is the rule in England<sup>1</sup> and in all of the States,<sup>2</sup>

Baird, 62 N. Y. 329; Dryden v. Kellogg, 2 Mo. App. 92; Matheny v. Mason, 78 Mo. 677; Plummer v. Newdigate, 2 Duval, 1.

<sup>1</sup> Hall v. Conder, 2 C. B. (N. s.) 40; Parkinson v. Lee, 2 East, 320; Harvey v. Young, Yel. 21; Jones v. Just, L. R. 3 Q. B. 197; Hopkins v. Tanqueray, 15 C. B. 130.

<sup>2</sup> Cozzins v. Whitaker, 8 Stew. & P. 322; Turner v. Huggins, 14 Ark. 22; Byrne v. Jansen, 50 Cal. 624; Dean v. Mason, 4 Conn. 428; Drew v. Roe, 41 Conn. 50; Morris v. Thompson, 85 Ill. 16; Bowman v. Clemmer, 50 Ind. 10; Richardson v. Bouck, 42 Iowa, 185; Standiford's Adm'r v. Schultz, 5 B. Mon. 581; Taymon v. Mitchell, 1 Md. Ch. 496; Hyatt v. Boyle, 5 Gill & J. 110; Mixer v. Coburn, 11 Met. 559; Seixas v. Wood, 2 Caines, 48; Sweet v. Colgate, 20 Johns. 196; Wright v. Hart, 18 Wend. 449; Beirne v. Dord, 5 N. Y. 8; Hargous v. Stone, 5 N. Y. 73; Day v. Pool, 52 N. Y. 416; Jackson v. Wetherill, 7 Serg. & R. 480; Eagan v. Call, 34 Pa. St. 236; Lord v. Grow, 89 Pa. St. 88; Warren v. Philadelphia Coal Co., 88 Pa. St. 487; Stevens v. Smith, 21 Vt. 90; Bryant v. Pember, 45 Vt. 487; Ryan v. Ulmer, 108 Pa. St. 332; Whitaker v. Eastwick, 75 Pa. St. 229; Welmer v. Clement, 87 Pa. St. 147; McFarland v. Memmer, 9 Watts, 55; Hadley v. Clinton, &c. Co., 13 Ohio St. 502; Hawkins v.

~~except~~ in Louisiana in which the civil law obtains,<sup>1</sup> and in ~~North~~ Carolina,<sup>2</sup> where the maxim is adopted that a sound ~~goods~~ warrants a sound article. But the maxim must not ~~be~~ construed to mean that the vendor warrants the article ~~to be~~ equal in value to the price, but simply that the thing is sound, and free from blemishes.<sup>3</sup> There will, of course, be ~~no~~ implied warranty where the parties agree that the buyer shall take the property at his own risk,<sup>4</sup> or where the buyer is informed or knows of the defects before he concludes the sale.<sup>5</sup> It is also the rule in this State, as elsewhere,<sup>6</sup> that an implied warranty will be limited by an express special warranty, as where the seller expressly war-

Pemberton, 51 N. Y. 198; Moses v. Mead, 1 Denio, 378; Welsh v. Carter, 1 Wend. 185; Holden v. Dakin, 4 Johns. 421; Otto v. Alderson, 10 Smed. & M. 476; Winson v. Lombard, 18 Pick. 59; Johnston v. Cope, 3 H. & John. 89; Kingsbury v. Taylor, 29 Me. 508; Scott v. Senwick, 1 B. Mon. 64; Dean v. Morey, 33 Iowa, 120; Humphreys v. Comline, 8 Blatchf. 516; Roberts v. Hughes, 81 Ill. 130; Frazier v. Harvey, 34 Conn. 469; Johnson v. Powers, 65 Cal. 181; Moore v. McKinlay, 5 Cal. 471; West v. Cunningham, 9 Port. 104; Lukens v. Frelund, 27 Kan. 664; Getty v. Rountree, 2 Plun. 379; 2 Chandl. 28; Maxwell v. Lee (Minn.), 27 N. W. Rep. 196; Pac. Iron Works v. Newhall, 34 Conn. 67; Wolcott v. Mount, 36 N. J. L. 262; 38 N. J. L. 496; Deming v. Foster, 42 N. H. 165; Warren Glass Works Co. v. Keystone Coal Co., 65 Md. 547; Barnard v. Kellogg, 10 Wall. 383; Reynolds v. Palmer, 21 Fed. Rep. 440.

<sup>1</sup> Dewees v. Morgan, 1 Mart. (La.) 1 Melancon v. Robichaux, 17 La. 97. But see Rochi v. Schwabacher, 33 La. An. 1334.

<sup>2</sup> Timrod v. Shoolbred, 1 Bay, 324; State v. Gaillard, 2 Bay, 19; Barnard v. Yates, 1 Nott & McC. 142; Missroon v. Waldo, 2 Nott & McC. 76; Thomas v. Sexton, 15 S. C. 93. The rule also applies to auction sales. Duncan v. Bell, 2 Nott & McC. 382; Rose v. Beatie, 2 Nott & McC. 538. But not to sales by sheriff nor to judicial sales in general. Thayer v. Sheriff, 2 Bay, 169; Yates v. Bond, 2 McCord, 382; Tunno v. Fludd, 1 McCord, 121; Robinson v. Cooper, 1 Hill, 287; Davis v. Murray, 2 Mill, 143; Harth v. Gibbes, 3 Rich. 316; Wingo v. Brown, 14 Rich. 103.

<sup>3</sup> Smith v. Rice, 1 Bailey, 648.

<sup>4</sup> Thompson v. Lindsay, 3 Brev. 305.

<sup>5</sup> Wood v. Ashe, 1 Strobb. 407; Whitefield v. McLeod, 2 Bay, 380. See Carnochan v. Gould, 1 Bailey, 179; Rose v. Beatie, 2 Nott & McC. 538.

<sup>6</sup> See *ante*, § 182.

rants the soundness "according to the best of his knowledge."<sup>1</sup>

But the maxim *caveat emptor* can be applied with justice only where it is reasonably possible for the buyer to discover the defects in the goods for himself. Wherever the buyer has the opportunity of inspecting the goods, and the defects could be discovered by him, if discoverable at all, the maxim applies, and he is required to exercise his own judgment. There will be no implied warranty of quality in such cases.<sup>2</sup> And no warranty of quality will be implied in such a case, even where the defects are latent, and cannot be discovered by the buyer after the closest examination, and the buyer is without remedy, unless the seller is guilty of fraud or the buyer has protected himself by an express warranty.<sup>3</sup> But if the buyer has not an equal opportunity with the seller of inspecting the goods, then the reason of the maxim would fail, and it would be but just to the buyer, that an implied warranty of quality should be recognized in his favor; and this is done at least in some cases of this sort.<sup>4</sup> In the succeeding sections, the exceptions to the maxim *caveat emptor* will be explained.

§ 188. Sales by sample. — Where a sale is made of goods, by means of the exposure and examination of a sam-

<sup>1</sup> *McLaughlin v. Horton*, 1 Hill, 368.

<sup>2</sup> *Jones v. Just*, L. R. 3 Q. B. 197; *Downing v. Dearborn*, 77 Me. 457; *Turner v. Muchlow*, 8 Jur. (N. S.) 870; *Frazier v. Harvey*, 34 Conn. 469; *Slaughter v. Gerson*, 13 Wall. 379; *Lord v. Grow*, 39 Pa. St. 388; *Hunger v. Evans*, 38 Ark. 334; *Byrne v. Jansen*, 50 Cal. 624; *Carson v. Baillie*, 19 Pa. St. 375; *Barr v. Gibson*, 3 M. & W. 390.

<sup>3</sup> *Parkinson v. Lee*, 2 East, 314; *Frazier v. Harvey*, 34 Conn. 469; *Hadley v. Clinton, & Co.*, 13 Ohio St. 502; *Kingsbury v. Taylor*, 29 Me. 508; *Lukens v. Frelund*, 27 Kan. 664. But see *French v. Vining*, 102 Mass. 132; *Bragg v. Morrill*, 49 Vt. 45; *Rodgers v. Niles*, 11 Ohio St. 48; *Lord v. Grow*, 39 Pa. St. 88; *Walker v. Pue*, 57 Md. 155; *Dickinson v. Gay*, 7 Allen, 29; *Hoe v. Sanborn*, 21 N. Y. 552.

<sup>4</sup> See *Gardiner v. Gray*, 4 Camp. 144; *Beals v. Olinstead*, 24 Vt. 114; *Pease v. Sabin*, 38 Vt. 432; *Lord v. Grow*, 39 Pa. St. 88.

ple, instead of the bulk of the goods, there is a necessary implication that the seller warrants that the bulk will be equal to the sample in quality. Without such an implication, the use of the sample would be without meaning.<sup>1</sup> But the implied warranty in this case only amounts to an assurance that the bulk corresponds to sample in kind and quality.<sup>2</sup> There is no implied warranty against latent defects in the goods, which are present in both sample and bulk.<sup>3</sup>

<sup>1</sup> *Moore v. McKinlay*, 5 Cal. 471; *Merriman v. Chapman*, 32 Conn. 146; *Hanson v. Busse*, 45 Ill. 499; *Webster v. Granger*, 78 Ill. 230; *Home Lighting-rod Co. v. Neff*, 60 Iowa, 138; *Gill v. Kauffman*, 16 Kan. 571; *Gunther v. Atwell*, 19 Md. 157; *Hastings v. Lovering*, 2 Pick. 219; *Henshaw v. Robbins*, 9 Met. 86; *Dickinson v. Gay*, 7 Allen, 29; *Schnitzer v. Oriental Print Works*, 114 Mass. 123; *Graff v. Foster*, 67 Mo. 512; *Hollender v. Koelter*, 20 Mo. App. 79; *Boothby v. Plaisted*, 51 N. H. 436; *Onelda Mfg. Co. v. Lawrence*, 4 Cow. 440; *Gallagher v. Waring*, 9 Wend. 20; *Beebe v. Robert*, 12 Wend. 412; *Osborn v. Gantz*, 60 N. Y. 540; *Moses v. Mead*, 1 Denio, 378; *Beirne v. Dord*, 5 N. Y. 95; *Harjons v. Stone*, 5 N. Y. 78; *Reynolds v. Palmer*, 21 Fed. Rep. 433, note; *Rose v. Beatie*, 2 Nott & McC. 538; *Whitaker v. Hueske*, 29 Tex. 355; *Barnard v. Kellogg*, 10 Wall. 383; *Getty v. Rountree*, 2 Chand. 28; *Merriam v. Field*, 24 Wis. 640; *Proctor v. Spratley*, 78 Va. 254; *Schuchardt v. Allens*, 1 Wall. 359; *Brantley v. Thomas*, 22 Tex. 270; *Dayton v. Hooglund*, 39 Ohio St. 671; *Leonard v. Fowler*, 44 N. Y. 289; *Brower v. Lewis*, 19 Barb. 574; *Boorman v. Jenkins*, 12 Wend. 566; *Dike v. Reitlinger*, 23 Hun, 241; *Howard v. Hoey*, 23 Wend. 350; *Waring v. Mason*, 18 Wend. 425; *Andrews v. Kneeland*, 6 Cow. 354; *Sands v. Taylor*, 5 Johns. 395; *Merrill v. Wallace*, 9 N. H. 116; *Voss v. McGuire*, 18 Mo. App. 477; *Day v. Ragnet*, 14 Minn. 273; *Lothrop v. Otis*, 7 Allen, 435; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52; *Williams v. Spafford*, 8 Pick. 250; *Bradford v. Manly*, 13 Mass. 139; *Hall v. Plassen*, 19 La. Ann. 11; *Myer v. Wheeler*, 65 Iowa, 390; *Converse v. Harzfeldt*, 11 Bradw. 153; *Hubbard v. George*, 49 Ill. 275; *Wilcox v. Howard*, 51 Ga. 298; *Hughes v. Bray*, 60 Cal. 284; *Parker v. Palmer*, 4 B. & Ald. 387; *Parkinson v. Lee*, 2 East, 314; *Mining Co. v. Jones*, 108 Pa. St. 55.

<sup>2</sup> *Gunther v. Atwell*, 19 Md. 157; *Pope v. Allis*, 115 U. S. 363; *Russel v. Nicolopulo*, 8 C. B. (N. S.) 362; *Parker v. Palmer*, 4 B. & Ald. 357; *Williams v. Spafford*, 8 Pick. 250; *Hanson v. Busse*, 45 Ill. 496; *Reynolds v. Palmer*, 21 Fed. Rep. 454, note; *Day v. Raquet*, 14 Minn. 273; *Parkinson v. Lee*, 2 East, 314; *Beirne v. Dord*, 5 N. Y. 95; *Buck v. Levy*, 101 N. Y. 514.

<sup>3</sup> Reference is only had here to sellers of goods, manufactured by others. *Sands v. Taylor*, 5 Johns. 404; *Bradford v. Manly*, 13 Mass.

Where the seller takes samples from different parts or packages of the same bulk, and then mixes up these samples, so that he may get an "average sample," *i. e.*, one that would correspond to the average quality of the bulk, and the purchase is made by the buyer knowingly "by average sample," there is no breach of the implied warranty of correspondence of sample with bulk, if some of the packages are inferior to the sample. The warranty is performed, if the sample corresponds in quality to the average quality of the bulk of the goods.<sup>1</sup>

In Pennsylvania, the implied warranty of title in the case of sales by sample, is confined to an assurance that the bulk will be of the same species and kind as the sample, and that the bulk is of a merchantable quality; but not that the bulk is equal in quality to the sample.<sup>2</sup>

But in order that the implied warranty of correspondence of the bulk with the sample may be claimed, it must be a veritable sale by sample. It is not sufficient that the sample is exhibited. It must be exhibited with the intention and understanding of the parties that the seller assures the buyer that the sample is a reliable representative of what the bulk of the goods is; and that the buyer may determine the quality of the goods by an examination of the sample. If the facts of the case do not sup-

189; *Dickinson v. Gay*, 7 Allen, 29. But see *Drummond v. Van Ingen*, 24 Rep. 781; 57 Law T. (N. S.) 1, where it is held that, along with the implied warranty of correspondence to sample, there may also be an implied warranty that the goods were suitable for the purpose for which they were knowingly sold.

<sup>1</sup> *Leonard v. Fowler*, 44 N. Y. 289. See also *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

<sup>2</sup> *Boyd v. Wilson*, 83 Pa. St. 319; *Barrekins v. Bevin*, 3 Rawle, 23; *Jennings v. Gratz*, 3 Rawle, 168; *McFarland v. Newman*, 9 Watts, 55; *Carson v. Baillie*, 19 Pa. St. 375; *Eagan v. Call*, 34 Pa. St. 236; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Weimer v. Clement*, 1 Wright, 147; *Wetherill v. Neilson*, 20 Pa. St. 448; *Fraley v. Bispham*, 10 Pa. St. 320; *Kirk v. Nice*, 2 Watts, 367.



port the presumption that the seller intended to warrant the correspondence of the bulk with the sample, the mere production of the sample will not raise the implication of the warranty.<sup>1</sup> The intention of the parties to make a sale by sample, can only be determined by inference from the facts of each case, since any expression of the intention to assure the buyer, that the goods corresponded in quality with the sample, would make it an express warranty, which always takes the place of and excludes the implied warranty, covering the same ground.<sup>2</sup> Parol evidence is ordinarily admissible to prove the sale by sample,<sup>3</sup> but if the contract is in writing, and nothing in the writing reveals the fact that a sample was used in the making of the sale, parol evidence cannot be used to establish the fact that it was a sale by sample.<sup>4</sup>

The opportunity to inspect the goods is an important element in determining whether the parties intended to make the sale by sample or not. Ordinarily, if the buyer had no opportunity to inspect the goods, and a sample is exhibited at the sale, and offered to him for examination, the courts would presume that it was a sale by sample, and would recognize the implication of a warranty of correspondence of the sample with the goods.<sup>5</sup> But this presumption is disputable, and may be rebutted by other facts, as, for example, when the seller refuses to sell by the sample, and suspends the final conclu-

<sup>1</sup> *Hargous v. Stone*, 5 N. Y. 73; *Beirne v. Dord*, 5 N. Y. 95; *Gardiner v. Gray*, 4 Camp. 144; *Cousinery v. Pearsall*, 8 J. & S. 113; *Day v. Raguet*, 14 Minn. 282; *Ames v. Jones*, 77 N. Y. 614; *Proctor v. Spratley*, 78 Va. 254; *Borthwick v. Young*, 12 Ont. App. 671; *Selser v. Roberts*, 105 Pa. St. 242; *Atwater v. Clancy*, 107 Mass. 369; *Reynolds v. Palmer*, 21 Fed. Rep. 455, note.

<sup>2</sup> See *McMullen v. Helberg*, 4 L. R. Ir. 100; *Powell v. Horton*, 2 Bing. N. C. 668; *Tye v. Finmore*, 3 Camp. 462.

<sup>3</sup> *Atwater v. Clancy*, 107 Mass. 369.

<sup>4</sup> *Wiener v. Whipple*, 53 Wis. 298.

<sup>5</sup> *Beirne v. Dord*, 5 N. Y. 95.

sion, until the buyer has had an opportunity to inspect the goods.<sup>1</sup>

So, on the other hand, there may be a sale by the sample, and the seller may be presumed to assure the buyer that the goods are equal to the sample, although there is an opportunity to inspect the goods, provided from all the facts of the case such an intention may be deduced.<sup>2</sup>

It is a question of fact for the jury whether the intention of the parties was to make a sale by sample.<sup>3</sup>

§ 189. **Identity of kind — Sales by description.** — If the buyer is not shown the goods either in bulk or in sample, but the sale is effected by a description of the goods, there is an implied warranty that the goods when delivered will correspond to the description of them, in reliance upon which the sale was made. But a distinction must be made between those definite descriptions, which amount to a positive assurance that the goods will correspond with them, and the indefinite expressions of the quality of the goods, which consists simply of what is called “dealer’s talk” and impose no liability upon the seller. Where the descriptions are definite and exact, they imply a warranty that the goods will be of the same quality and kind as the description represents them to be.<sup>4</sup> It is always a question of law for the construction of the court, when the contract is in writing<sup>5</sup> and a question of fact for the jury, when the contract is parol, whether the expressions are sufficiently definite to support the implication of a warranty that the

<sup>1</sup> *Salisbury v. Stainer*, 19 Wend. 159; *Barnard v. Kellogg*, 10 Wall. 383.

<sup>2</sup> 2 Schoul. Personal Prop., § 359. See *Williams v. Spafford*, 8 Pick. 259.

<sup>3</sup> *Atwood v. Clancy*, 107 Mass. 369; *Waring v. Mason*, 18 Wend. 445; *Jones v. Wasson*, 3 Bart. 211.

<sup>4</sup> *Hastings v. Lovering*, 2 Pick. 215; *Hogins v. Plympton*, 11 Pick. 97.

<sup>5</sup> *Behn v. Bumess*, 3 Best & Smith, 751.

goods will correspond with the description.<sup>1</sup> And the courts seem disinclined to construe doubtful descriptions into warranties.<sup>2</sup>

Ordinarily, the cases, in which the descriptions have been held to amount to warranties, are those in which the goods are known and sold by a trade name or mark, and such sales raise the presumption of an assurance or warranty that the goods sold are those which are known by that name.<sup>3</sup> In the note below, are given illustrations of the description by trade name, which is held to amount to a warranty.<sup>4</sup>

But the implied warranty arising out of a description or trade name, only extends to an assurance that the goods sold will be of the same kind as is sold under that description or trade-mark; and will not include a warranty that the goods will be of any particular quality. The implied warranty will be satisfied if the goods delivered are sold under the given trade-mark, or are known to fill the description.<sup>5</sup>

<sup>1</sup> *Wolcott v. Mount*, 36 N. J. L. 262; *Lomi v. Tucker*, 4 C. & P. 15; *Power v. Barham*, 4 Ad. & E. 473; *DeSewhandberg v. Buchanan*, 5 C. & P. 343.

<sup>2</sup> See *Maxwell v. Lee*, 27 N. W. Rep. 196; *Bach v. Levy*, 18 Jones & S. 519; (5 N. E. Rep. 345); *Forchelmer v. Stewart*, 65 Iowa, 504.

<sup>3</sup> *Bagley v. Cleveland Rolling Mill*, 21 Fed. Rep. 159; *Baker v. Lyman*, 38 Up. Can. Q. B. 498; *Catchings v. Hacke*, 15 Mo. App. 51; *Flint v. Lyon*, 4 Cal. 17; *Lewis v. Rountree*, 78 N. C. 323.

<sup>4</sup> *Osgood v. Lewis*, 2 Harr. & G. 495 (description — “*winter-pressed* sperm oil” — the goods — *summer-pressed* sperm oil); *Gardiner v. Lane*, 9 Allen, 492; 12 Allen, 399; 98 Mass. 492 (description — “*Mackerel No. 1*” — goods — *Mackerel No. 3.*); *Edgar v. Canadian Oil Co.*, 28 Up. Can. Q. B. 333 (Rock oil); *Mader v. Jones*, 1 Russell & C. 82 (Gulf-herring Split No. 1.); *Hawkins v. Pemberton*, 51 N. Y. 198 (blue vitriol, sound and in good order); *Wolcott v. Mount*, 36 N. J. L. 262 (description, “*early strap-leaf red-top turnip seed,*” goods “*Russia Turnip-seed*”); *White v. Miller*, 71 N. Y. 118 (large Bristol cabbage seed); *Dounce v. Dow*, 64 N. Y. 411 (XX pipe iron); *Jones v. George*, 61 Tex. 345 (“*Paris Green;*” goods “*Chrome green*”); *Lewis v. Rountree*, 78 N. C. 323 (stained rosin); *Whittaker v. McCormick*, 6 Mo. App. 114 (No. 2 white mixed corn.)

<sup>5</sup> *Lamb v. Crafts*, 12 Met. 353; *Winsor v. Lombard*, 18 Pick. 57;

§ 190. Implied warranty of merchantability — Manufacturer's liability — Fitness for a particular use. — But while, as a general rule, the sale of goods by description does not imply any other warranty than that the goods will correspond to the description, and does not raise by implication the warranty that the goods shall have any particular qualities,<sup>1</sup> yet if the goods are manufactured or prepared for a special use, and the adaptation of the goods for that use constitutes the essential element in the description of the goods, the dealer, and especially the manufacturer, will be presumed to have warranted the goods to be fit for that particular use when it is understood that the goods are bought for that purpose, and some of the cases go so far as to hold that there is an implied warranty against all latent defects which would render the goods unfit for the use for which they were bought.<sup>2</sup> And where the sale is made

*Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Dollard v. Potts*, 6 Allen (N. B.), 443; *Osgood v. Lewis*, 2 Har. & G. 495; *Snelgrove v. Bruce*, 16 Up. Can. C. P. 561; *Carson v. Baillie*, 19 Pa. St. 375; *Shister v. Baxter*, 109 Pa. St. 443; *Wetherell v. Nelson*, 20 Pa. St. 448; *Jennings v. Gratz*, 3 Rawle, 168; *Coate v. Terry*, 26 Up. Can. C. P. 40; *Hyatt v. Boyle*, 5 Gill & J. 110; *Whitman v. Freese*, 23 Me. 212.

<sup>1</sup> See *Wolcott v. Mount*, 32 N. J. L. 262; *Olivant v. Bayley*, 5 Q. B. 288; *Mixer v. Coburn*, 11 Met. 559; *Jones v. Just*, L. R. 3 Q. B. 197; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Windsor v. Lombard*, 18 Pick. 55; *Chanter v. Hopkins*, 4 M. & W. 414.

<sup>2</sup> *Rogers v. Niles*, 11 Ohio St. 48; *Cunningham v. Hall*, 1 Sprague, 404; *White v. Miller*, 71 N. Y. 118; *Gammell v. Gunby*, 52 Ga. 504; *Wilcox v. Hall*, 53 Ga. 635; *Wilcox v. Owens*, 64 Ga. 601; *Best v. Flint*, 58 Vt. 548; *Poland v. Miller*, 95 Ind. 887; *Wilson v. Danville*, 4 L. R. Ir. 249; 6 L. R. Ir. 210; *Beals v. Olmstead*, 24 Vt. 114; *Cunningham v. Hall*, 4 Allen, 273; *Bigelow v. Baxall*, 38 Up. Can. Q. B. 452; *Boothby v. Scales*, 27 Wis. 626; *Overton v. Phelan*, 2 Head, 445; *Howard v. Hoey*, 23 Wend. 350; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Getty v. Rountree*, 2 Chand. 28; *Robinson Mach. Works v. Chandler*, 56 Ind. 575; *Craver v. Hornburg*, 26 Kans. 94; *Merrill v. Nightingale*, 39 Kans. 247; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Curtis Mfg. Co. v. Williams*, 3 S. W. Rep. (Ark.) 517; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Fish v. Tank*, 12 Wis. 276; *Brenton v. Davis*, 8 Blatchf. 317; *Byers v. Chapin*, 28 Ohio St. 800; *Downing v. Dearborn*, 77 Me. 457; *Harris v. Waite*, 51

by the manufacturer he is also presumed to warrant that the goods are generally merchantable, *i.e.*, that they are free from any noteworthy defect.<sup>1</sup> But in order that the implied warranty of merchantability and fitness for a particular use may be claimed, the buyer must not himself select the goods. The goods must be selected by the dealer or manufacturer, and he must know that the buyer wants them for some particular use. The dealer or manufacturer is not liable on any implied warranty, if the buyer relies upon his own judgment in the selection of the goods, although the seller may know that the buyer is buying them for a particular use, and that they are not fit for that use.<sup>2</sup>

§ 191. **Implied warranty in sales of provisions.** — Independently of statute, the English law does not recognize any implied warranty that in a sale of provisions the goods

Vt. 480; *Dawes v. Peebles*, 6 Fed. Rep. 856; *Thomas v. Simpson*, 80 N. C. 4; *Pease v. Sabin*, 38 Vt. 432; *Rice v. Forsyth*, 41 Md. 389; *Whitmore v. South Boston Ice Co.*, 2 Allen, 273; *Spurr v. Albert Mining Co.*, 2 Hannay (N. B.), 361; *Dounce v. Dow*, 64 N. Y. 411; *Gerst v. Jones*, 32 Gratt. 518; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; *Bragg v. Morrill*, 49 Vt. 45; *Hoe v. Sanborn*, 21 N. Y. 552; *Brown v. Sayles*, 27 Vt. 227.

<sup>1</sup> *Gallagher v. Waring*, 9 Wend. 28; *Merriam v. Field*, 24 Wis. 640; *McClung v. Kelley*, 21 Iowa, 508; *Mesner v. Granger*, 4 Gilm. 69; *Gaylord Mfg. Co. v. Allen*, 53; N. Y. 515; *Cullen v. Bimm*, 37 Ohio St. 236; *Wilcox v. Hall*, 53 Ga. 635; *Gammell v. Gunby*, 52 Ga. 504; *Brantley v. Thomas*, 22 Tex. 270; *Howard v. Hoey*, 23 Wend. 350. And this implied warranty of merchantability has been held to arise alongside of express warranties as to other qualities. *Wilcox v. Owens*, 64 Ga. 601; *Merriam v. Field*, 24 Wis. 640. But see *contra*, *Owens v. Dunbar*, 12 L. R. Ir. 304; *Rowe v. Farren*, 8 C. L. R. Ir. 46.

<sup>2</sup> *Deeming v. Foster*, 42 N. H. 165; *County of Simcoe Ag. Soc. v. Wade*, 12 Up. Can. Q. B. 614; *Walker v. Pue*, 57 Md. 155; *Farrows v. Andrews*, 69 Ala. 96; *Kohl v. Lindley*, 39 Ill. 196; *Armstrong v. Bufford*, 51 Ala. 410; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149; *Shister v. Baxter*, 109 Pa. St. 443; *Tilton Safe Co. v. Tisdale*, 48 Vt. 88; *Cogel v. Kniseley*, 89 Ill. 598; *Warren Glass Works v. Keystone Coal Co.* 22 Rep. (Md.) 551; *Mason v. Chappell*, 15 Gratt. 572; *Scott v. Renick*, 1 B. Mon. 63; *Height v. Bacon*, 126 Mass. 10.

are fit for use as food.<sup>1</sup> But in the United States a distinction is made in this respect between sales to the consumer for immediate consumption, and sales of food by dealer to dealer. In the former case, the warranty is implied that the goods are wholesome and sound and fit for food, probably on the ground that the seller knows of the buyer's intention to make use of the goods as food.<sup>2</sup> But the principle is not universally recognized, except so far as to hold the dealer liable, when he makes the selection of the goods, and the buyer does not have the opportunity of inspecting them; and the dealer is of course liable, if he knows that the goods are unfit for food. And some of the cases which are ordinarily cited in support of the proposition of the text, are in fact cases of fraud and deceit.<sup>3</sup>

But where the goods are sold by dealers to dealers, the authorities unanimously declare that there is no implied warranty arising out of the ultimate intention that the goods shall be consumed as food; the courts evidently holding that the case is parallel with that of the vendor of razors, who, on being remonstrated with by one of his unfortunate purchasers, claimed exemption from liability for the worthlessness of the razor as a razor, on the ground that the razors were made *to sell*, not to shave with. In the case of the wholesale trade in provisions, the provisions are considered solely as subjects of commerce, and not as food.<sup>4</sup>

<sup>1</sup> Burnby v. Bollett, 16 M. & W. 644. See Emmerton v. Matthews, 7 H. & N. 586; Bigge v. Parkinson, 7 H. & N. 955; Smith v. Baker, 40 L. T. N. S. 261.

<sup>2</sup> Hoover v. Peters, 18 Mich. 51; Morehouse v. Comstock, 42 Wis. 626; Reynolds v. Palmer, 21 Fed. Rep. 453; Sinclair v. Hathaway, 57 Mich. 60.

<sup>3</sup> Van Bracklin v. Fouda, 12 Johns. 468; Divine v. McCormick, 56 Barb. 116; Burch v. Spencer, 15 Hun, 304.

<sup>4</sup> Moses v. Mead, 1 Denio, 378; 5 Denio, 617; Ryder v. Neitge, 21 Minn. 70; Howard v. Emerson, 110 Mass. 321; Humphreys v. Comline, 8 Blachf. 516; Winson v. Lombard, 18 Pick. 61; Lukens v. Freilund, 27 Kan. 664.

§ 192. **Effect of usage on implied warranties of quality.** — A well established general usage may modify, restrict and enlarge the implied warranties of quality. As, for example, that tobacco shall remain merchantable for four months;<sup>1</sup> or that the goods shall maintain an average instead of an actual conformity to sample.<sup>2</sup> But it seems to be the opinion of the courts that the usage cannot raise or abrogate an implied warranty of quality in derogation of the common-law principles. The common-law principles must obtain in the matter of implied warranties of quality, until they have been abrogated by statute. Any proposed change by custom is invalid.<sup>3</sup>

§ 193. **Forms of express warranties — Affirmations and expressions of opinion — Express warranties distinguished from fraud.** — The express warranty need not assume any particular form of expression; nor is any particular word necessary to indicate the intention to warrant, not even the word “warrant,” although it is very commonly used.<sup>4</sup> If the subject-matter of the statement is sufficient to make it a warranty, the form of statement is immaterial.<sup>5</sup>

<sup>1</sup> *Fatman v. Thompson*, 2 Disney, 482.

<sup>2</sup> *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

<sup>3</sup> *Dickinson v. Gay*, 7 Allen, 29 (when the usage was for dealers to warrant against latent defects); *Dodd v. Farlow*, 11 Allen, 426 (where there was a usage to warrant the merchantability of goods which had been inspected by the buyer.) See, also, to same effect, *Wetherill v. Nellson*, 20 Pa. St. 448; *Whitmork v. South Boston Iron Co.*, 2 Allen, 52; *Coxe v. Heisley*, 19 Pa. St. 243.

<sup>4</sup> *Warren v. Philadelphia Coal Co.*, 83 Pa. St. 440; *Henshaw v. Robins*, 9 Met. 83; *Callanan v. Brown*, 31 Iowa, 333. See, also, *Towell v. Gatewood*, 2 Scam, 67; *Gregory v. Underhill*, 6 Lea, 207; *Warder v. Bowen*, 31 Minn. 335; *West Republic Mfg. Co. v. Jones*, 108 Pa. St. 55; *Neave v. Arntz*, 56 Wis. 174.

<sup>5</sup> But consult *Beeman v. Buck*, 3 Vt. 53; *Foster v. Caldwell*, 18 Vt. 176; *McFarland v. Newman*, 9 Watts, 55; *Ender v. Scott*, 11 Ill. 35; *House v. Fort*, 4 Blackf. 294.

Some of the cases hold that in order that any statement of the seller may amount to an express warranty of quality, it must be shown that he made the statement with the intention of warranting its truth. Unless this intention appears, it matters not how material and precise the statement is, it will not amount to a warranty.<sup>1</sup> But the better opinion is that any positive statement of a material fact which is made with the intention of influencing the buyer to buy, and the truth of which is relied upon by the buyer, will constitute a warranty, whether the seller intended to warrant the goods or not. The intention to warrant is conclusively presumed from his effort to influence the buyer's actions by a statement of fact.<sup>2</sup>

But in order that the statement may be construed to be a warranty, it must be "a positive affirmation of a material fact," and not an indefinite or inexact praise of the goods. General commendation of the goods does not constitute a warranty, for the reason that dealers are in the habit of praising up their goods generally without any intention whatever of assuring the buyer of the existence in the goods of any particular quality or qualities; and this practice of indulging in meaningless "dealer's talk" is so common and so well

<sup>1</sup> *McFarland v. Newman*, 9 Watts, 55; *Beeman v. Buck*, 3 Vt. 58; *Foster v. Caldwell*, 18 Vt. 176; *House v. Fort*, 4 Blackf. 294; *Ender v. Scott*, 11 Ill. 35.

<sup>2</sup> *Reed v. Hastings*, 61 Ill. 266; *Kenner v. Harding*, 85 Ill. 268; *Hawkins v. Pemberton*, 51 N. Y. 198; *Crenshaw v. Slye*, 52 Md. 146; *Potomac, &c., Co. v. Harlan, &c., Co.*, 4 Atl. Rep. (Md.) 903; *Mason v. Chappell*, 15 Gratt. 672; *Henshaw v. Robins*, 9 Met. 83; *Gross v. Gardner*, 3 Mod. 261; *Osgood v. Lewis*, 2 Har. & G. 518; *Figge v. Hill*, 61 Iowa, 430; *Hastings v. Lovering*, 2 Pick. 214; *Halliday v. Briggs*, 15 Neb. 219; *Pas'ey v. Freeman*, 3 T. R. 57; *Forchelmer v. Stewart*, 65 Iowa, 593; *Stroud v. Pierce*, 6 Allen, 418; *Chisholm v. Proudfoot*, 15 Up. Can. Q. B. 203; *Daniells v. Aldrich*, 42 Mich. 587; *Baum v. Stevens*, 2 Ired. 411; *Bunnell v. Whitlaw*, 14 Up. Can. Q. B. 241; *Ayres v. Parks*, 3 Hawks, 59; *Richmond Trading Co. v. Farquar*, 8 Blackf. 89; *Horton v. Green*, 66 N. C. 596; *Tuttle v. Brown*, 4 Gray, 457; *Roberts v. Morgan*, 2 Cow. 438; *Cook v. Moseley*, 13 Wend. 277; *Erwin v. Maxwell*, 3 Murphey, 241; *Foggart v. Blackweller*, 4 Ired. 238.



understood, that none but the unwary is misled by it. There is, therefore, no express warranty of quality, unless the statement is of a material and specific fact.<sup>1</sup> The only difference between a warranty and a fraudulent misrepresentation is that the latter contains the element of deceit, whereas that element is not at all essential to the former. A misstatement of a material fact is a breach of warranty, whether it was made innocently or knowingly. It does not constitute a fraud, unless its falsity was known to the party making it, or he made it carelessly without having reasonable grounds for believing it to be true.<sup>2</sup>

If the language used by the dealer admits of only one construction, the court must declare the statement to be a warranty or an irresponsible commendation of the goods, as the case may be.<sup>3</sup> But, if the character of the language is doubtful, it is a question for the jury, to be determined by them under instructions from the court.<sup>4</sup>

The time of making the warranty is not essential, as long as it has sufficient connection with the negotiations of the sale, to have induced or helped to induce the purchase,

<sup>1</sup> *Tabor v. Peters*, 74 Ala. 90; *Hawkins v. Pemberton*, 51 N. Y. 198; *Towell v. Gatewood*, 2 Scam. 22; *Halliday v. Briggs*, 15 Neb. 219; *Forcheimer v. Stewart*, 65 Iowa, 594; *Reynolds v. Palmer*, 21 Fed. Rep. 485; *Tewksburg v. Bennett*, 81 Iowa, 83; *McGrew v. Forsythe*, 31 Iowa, 179; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Hogins v. Plympton*, 11 Pick. 95; *Mason v. Chappell*, 15 Gratt. 572; *Byrne v. Jansen*, 50 Cal. 624; *Linn v. Gunn*, 23 N. W. Rep. (Mich.) 84; *Bartlett v. Hoppock*, 34 N. Y. 118; *Reed v. Hastings*, 61 Ill. 263; *Barrett v. Hall*, 2 Aikens, 269; *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Fraley v. Bespham*, 10 Pa. St. 320; *Ryan v. Ulmer*, 108 Pa. St. 332; *Rice v. Codman*, 1 Allen, 377.

<sup>2</sup> See *ante*, §§ 160, 180.

<sup>3</sup> *Daniel's v. Aldrich*, 42 Mich. 58; *Stroud v. Pierce*, 6 Allen, 418; *Halliday v. Briggs*, 15 Neb. 219, 228.

<sup>4</sup> *Whitney v. Sutton*, 10 Wend. 412; *Morrill v. Wallace*, 9 N. H. 111; *Tuttle v. Brown*, 4 Gray, 457; *Baum v. Stevens*, 2 Ired. 411; *Foggart v. Blackweller*, 4 Ired. 238; *Erwin v. Maxwell*, 3 Murphey, 241; *Cook v. Mosely*, 13 Wend. 277; *Roberts v. Morgan*, 2 Cow. 438; *Horton v. Green*, 66 N. C. 596; *Ayres v. Parks*, 8 Hawks, 59.

if it were made before the sale.<sup>1</sup> But if it were made after the sale, a new consideration would be required to support and give validity to the warranty.<sup>2</sup>

§ 194. Interpretation of warranties — Unsoundness in animals — warranties as to future condition. — While it is the province of the jury to determine in oral warranties what were the words used upon which the claim of a warranty could be made to rest,<sup>3</sup> yet the meaning and scope of the warranty when its terms have been proved, must be determined by the court, whether the warranty is written or oral.<sup>4</sup> The terms of express warranties are as varied as are the manifestations of human ingenuity and human interests, and the only general rule of interpretation, which may be given, is that the words used by the parties in the making of the warranty must be taken in the sense in which people ordinarily use them in the same connection. Their ordinary meaning must be taken as the true meaning, except where the word is proven to have a technical meaning, when used in such a warranty, and in that case the word is held to have been used in the technical sense.<sup>5</sup>

The most common case of dispute over the scope and meaning of warranties, is the warranty against unsoundness in animals. At one time, it was supposed that a warranty as to soundness was not broken by a temporary and curable

<sup>1</sup> *Wilmot v. Hurt*, 11 Wend. 584; *Diesbach v. Lewisburg Bridge Co.*, 81 Pa. St. 177; *Gregory v. Underhill*, 6 Lea, 207; *Hoult v. Baldwin*, 67 Cal. 610; *Chapman v. Gwyther*, L. R. 1 Q. B. 468; *Bristol v. Tracy*, 21 Barb. 236; *Craig v. Miller*, 22 Up. Can. C. P. 348; *Baldwin v. Daniell*, 69 Ga. 791.

<sup>2</sup> See *ante*, § 181.

<sup>3</sup> See *ante*, § 193, and *post*, § 196.

<sup>4</sup> See *Short v. Woodward*, 13 Gray, 86.

<sup>5</sup> See *Budd v. Fairmaner*, 8 Bing. 48; *Wason v. Rowe*, 16 Vt. 525; *Richardson v. Brown*, 1 Bing. 344; *Chapman v. Gwyther*, L. R. 1 Q. B. 464; *Bywater v. Richardson*, 1 Ad. & E. 508; *Willard v. Stevens*, 24 N. H. 271. See also *Jones' Construction of Commercial & Trade Contracts*, pp. 271-276.

ailment, and even now this is held to be no breach of the warranty if the temporary ailment does not interfere with his present usefulness.<sup>1</sup> But it has been held that any ailment, whether temporary or permanent, would be a breach of the warranty of soundness, if there has been any alteration of structure, or the prevalence of the disease in any way interferes with the present or future usefulness of the animals.<sup>2</sup> On the other hand, a temporary lameness has been held to be no breach of the warranty,<sup>3</sup> and so, likewise, a simple cold, which could be controlled by ordinary remedies.<sup>4</sup> And a mare with foal was held to fulfil the terms of a warranty that she was "all right every way for livery purposes."<sup>5</sup> But whatever variance there may be on this question, it seems to be settled that the fact that the disease is curable does not take it outside of the warranty of soundness.<sup>6</sup> An incipient disease is as much a breach of the warranty, as when it is fully developed. This has been held to be the case with glanders, and rheumatism.<sup>7</sup> "Cribbing" is an unsoundness.<sup>8</sup>

<sup>1</sup> *Roberts v. Jenkins*, 21 N. H. 119.

<sup>2</sup> *Kenner v. Harding*, 25 Ill. 264; *Coates v. Stevens*, 2 Moody & R. 157; *Holliday v. Morgan*, 1 El. & E. 1; *Schurtz v. Kleinmeyer*, 36 Iowa, 392; *Kiddell v. Burnard*, 9 M. & W. 668; *Roberts v. Jenkins*, 21 N. H. 118; *Kornegay v. White*, 10 Ala. 255.

<sup>3</sup> *Brown v. Bigelow*, 10 Allen, 242.

<sup>4</sup> *Springstead v. Lawson*, 23 How. Pr. 302.

<sup>5</sup> *Whitney v. Taylor*, 54 Barb. 536.

<sup>6</sup> *Thompson v. Bertrand*, 23 Ark. 731. It was held to be a doubtful question, for the jury, whether "corns" in a horse's foot is unsoundness, in *Alexander v. Dutton*, 58 N. H. 232. See, also, on this general subject, *Kiddell v. Burnard*, 9 M. & W. 608; *Bolden v. Brogden*, 2 Moody & R. 113; *Finley v. Quirk*, 9 Minn. 194.

<sup>7</sup> *Woodbury v. Robbins*, 10 Cush. 520; *Crouch v. Culbreath*, 11 Rich. 9, overruling *Stephens v. Chappel*, 3 Strobb. 80. See, also, *Fordren v. Durfee*, 39 Miss. 323; *Kenner v. Harding*, 25 Ill. 265; *Hook v. Stovall*, 21 Ga. 69.

<sup>8</sup> *Washburn v. Cuddihy*, 8 Gray, 430; *Dean v. Morey*, 33 Iowa, 120. In *Walker v. Holsington*, 43 Vt. 608, the warranty was that the horse was "sound and right."

The language of the warranty will of course vary; and in every case the words used should be construed according to their natural import. In accordance with this general rule, it seems to be accepted that such warranties that the animal was "sound and right," "sound and kind," "sound and perfect," "all right in every respect," and the like, would include a warranty of a kind and gentle disposition as well as of soundness.<sup>1</sup> So also, the warranty was held to be broken by partial blindness, although the warranty was that the horse was "all right, except that he will sometimes shy."<sup>2</sup>

Ordinarily, warranties are presumed to assure only the present state of the subject of the sale, and not to apply to its future condition.<sup>3</sup> But if the intention that the warranty is to be a continuing one is made explicit in the language used, there is no reason why the warranty should not be construed as an assurance of future qualities and condition.<sup>4</sup>

**§ 195. Express warranties in relation to patent or obvious defects.** — It is sometimes stated without qualification that an express warranty does not cover patent defects, un-

<sup>1</sup> See 2 Schouler Personal Prop., § 340; *Walker v. Hoisington*, 43 Vt. 608; *Cook v. Mosely*, 13 Wend. 277; *Smith v. Justice*, 13 Wis. 600 (fitness for use in harness). In *Bodurtha v. Phelon*, 2 Allen, 242, the warranty was that the horse was "well broke."

<sup>2</sup> *Kingsley v. Johnson*, 49 Conn. 462.

<sup>3</sup> *Stamm v. Kuhlman*, 1 Mo. App. 296; *Leggatt v. Sands' Ale Co.*, 60 Ill. 158; *Merrick v. Bradley*, 19 Md. 50; *Bowman v. Chemmer*, 50 Ind. 10; *Miller v. McDonald*, 13 Wis. 678.

<sup>4</sup> *Fatman v. Thompson*, 2 Disney, 482; *Osborn v. Nicholson*, 13 Wall. 654; *Richardson v. Mason*, 53 Barb. 601; *Nicholls v. Noidheimer*, 22 Up. Can. C. P. 48; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111, in which it was held that the words "every piano warranted for five years," were held to constitute simply an assurance that the piano had no inherent defects which would cause it to break or get out of repair during the five years and was not broken by the existence of any defect in style or grade.

less expressly included and referred to.<sup>1</sup> But while this may be true, so far as to raise the presumption that the purchaser was aware of the patent defects, and therefore did not rely upon the warranty for protection against defects, of whose existence he was already aware,<sup>2</sup> yet that presumption cannot be held to be conclusive, and wherever it can be shown that the buyer relied absolutely upon his warranty, and made no attempt to exercise his own judgment in the determination of the value and quality of the goods, the warranty will cover obvious, as well as hidden defects.<sup>3</sup>

But, in order that in any case the obviousness of the defect may exclude it from the operation of the express warranty, it must be so patent that an ordinary purchaser may discover it and that no special skill or knowledge is required for its detection.<sup>4</sup> And not only must the defect itself be discoverable, but its full and complete scope and effect. If the patent defect does not at the time of sale appear to be very serious, and it develops into a more serious trouble, the express warranty of soundness will be broken thereby.<sup>5</sup> And the very fact that the consequences of the defect cannot be reliably determined in advance, is in itself evidence of an intention of the buyer to rely upon the warranty for protection against the possible conse-

<sup>1</sup> *Hill v. North*, 34 Vt. 604; *Dillard v. Moore*, 2 Eng. 166; *Vandewalker v. Osmer*, 65 Barb. 556; *Bennett v. Buchan*, 76 N. Y. 386; *Jordan v. Foster*, 6 Eng. 141; *Hudgins v. Perry*, 7 Ired. 102; *McCormick v. Kelly*, 28 Minn. 137; *Williams v. Ingram*, 21 Tex. 300.

<sup>2</sup> See *Long v. Hicks*, 2 Humph. 305; *Schuyler v. Russ*, 2 Caines, 202; *Marshall v. Drawhorn*, 27 Ga. 275; *Leavitt v. Fletcher*, 60 N. H. 132.

<sup>3</sup> *Pinney v. Andrews*, 41 Vt. 631; *Fletcher v. Young*, 69 Ga. 591; *First Nat. Bank v. Grindstaff*, 45 Ind. 158.

<sup>4</sup> *Birdseye v. Frost*, 34 Barb. 367; *Pinney v. Andrews*, 41 Vt. 631; *Margetson v. Wright*, 7 Bing. 608; *Henshaw v. Robins*, 9 Met. 83; *Meckley v. Parsons*, 66 Iowa, 63; *Fletcher v. Young*, 69 Ga. 594; *Tye v. Finmore*, 3 Camp. 462; *Brown v. Bigelow*, 10 Allen, 242; *Yates v. Cornelius*, 59 Wis. 615.

<sup>5</sup> *Fisher v. Pollard*, 2 Head, 314; *Shewalter v. Ford*, 34 Miss. 417.

quences of the defect.<sup>1</sup> If the seller throws the purchaser off his guard by his representations or actions, or in any other way conceals the defects, they will of course, so far as that purchaser is concerned, cease to be patent defects and will be included in the warranty.<sup>2</sup>

It hardly needs to be stated that an express warranty may be so constructed as to include every obvious as well as latent defect; and that the present inquiry is simply into the presumption of law, when the language of the warranty is general, and contains no specific or necessary reference to the obvious defects.<sup>3</sup>

§ 196. **Written and oral warranties.** — If the sale is made by a formally written contract, a regular bill of sale, and the warranty of quality is not included, the missing warrant cannot be supplied by parol evidence, whether the warranty be prior to, or contemporaneous with the main transaction, because this would offend the fundamental doctrine that parol evidence is inadmissible to vary or control the terms of a written contract. The warranty, although collateral to the sale, is held to be a material part of the contract, and must, therefore, be included in the writing, if the parties had intended to reduce the contract of sale to writing.<sup>4</sup> But if the writing be only an

<sup>1</sup> *Wallace v. Frazier*, 2 Nott & McC. 516; *Stucky v. Clyburn*, Cheves, 186; *Wilson v. Ferguson*, Cheves, 190; *Thompson v. Botts*, 8 Mo. 710; *Callaway v. Jones*, 19 Ga. 277.

<sup>2</sup> *Chadsey v. Green*, 24 Conn. 562; *Grant v. Shelton*, 3 B. Mon. 423; *Robertson v. Clarkson*, 9 B. Mon. 507; *Kenner v. Harding*, 85 Ill. 264; *Beals v. Olmstead*, 24 Vt. 114; *Tabor v. Peters*, 74 Ala. 90; *Pinney v. Andrews*, 41 Vt. 681.

<sup>3</sup> See *Marshall v. Drawhorn*, 27 Ga. 275, 279; *Shewalter v. Ford*, 34 Miss. 422; *Brown v. Bigelow*, 10 Allen, 244; *Meckley v. Parsons*, 66 Iowa, 63; *Hill v. North*, 84 Vt. 604; *Bank of Kansas City v. Grindstaff*, 45 Ind. 158; *McCormick v. Kelly*, 28 Minn. 135.

<sup>4</sup> *Lamb v. Crafts*, 12 Met. 353; *Reed v. Wood*, 9 Vt. 286; *Boardman v. Spooner*, 13 Allen, 353; *Frost v. Blanchard*, 97 Mass. 155; *Merriam v. Field*, 24 Wis. 640; *Randall v. Rhodes*, 1 Curtis, C. C. 90; *Whitmore v.*

informal memorandum or "bill of parcels," instead of a formal writing, and it is not intended by the parties to be the final repository of the intentions of the parties, then the contract of sale is a parol contract, the terms of which may be proved by parol or written evidence, or by a combination of both. In such cases, therefore, a warranty need not be proved by written evidence, although all the other terms of the contract may be contained in a memorandum.<sup>1</sup>

South Boston Iron Co., 2 Allen, 58; Jones v. Alley, 17 Minn. 292; Thompson v. Libby, 34 Minn. 374; Shepherd v. Gilroy, 46 Iowa, 198; Galpin v. Atwater 29 Conn. 93; Van Ostrand v. Reed, 1 Wend. 424; Munford v. McPherson, 1 Johns. 414; Dean v. Mason, 4 Conn. 432; Wood v. Ashe, 1 Strobb. 407; Pender v. Fobes, 1 Dev. & Bat. 250; Mullain v. Thomas, 43 Conn. 252. But see, apparently *contra dicta* in Chapin v. Dobson, 78 N. Y. 80, 81.

<sup>1</sup> In *Twell v. Gatewood*, 2 Scam. (Ill.) 28, the court said of the memorandum: "It possesses none of the constituent parts of a contract, but is, in form and in fact, a bill of parcels, and an acknowledgment of the receipt of the purchase money, and as such was properly received in evidence; but it does not follow that because it is evidence, as far as it goes, it is all the evidence that ought to be received." *Atwater v. Clancy*, 107 Mass. 365; *Koop v. Handy*, 41 Barb. 454; *Gordon v. Waterous*, 86 Up. Can. Q. B. 321; *Hazard v. Loring*, 10 Cush. 267; *Cassidy v. Begoden*, 6 Jones & Sp. 180; *Wallace v. Rogers*, 2 N. H. 506; *Fletcher v. Willard*, 14 Pick. 464; *Stacy v. Kemp*, 97 Mass. 168; *Hildreth v. O'Brien*, 10 Allen, 104; *Schenck v. Saunders*, 18 Gray, 37; *Sutton v. Crosby*, 54 Barb. 80; *Boorman v. Jenkins*, 12 Wend. 566; *McMullen v. Williams*, 5 Ont. App. 518; *Pessine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 N. Y. 338. Parol proof of a warranty is for stronger reasons not excluded by the existence of a written receipt for the price. *Hersom v. Henderson*, 21 N. H. 224; *Filkins v. Whyland*, 24 N. Y. 338. See, generally, in support of the proposition of the text, *Briggs v. Hilton*, 99 N. Y. 517; *Pike v. Fay*, 101 Mass. 136; *Bradford v. Manly*, 13 Mass. 139; *Foot v. Bentley*, 44 N. Y. 166; *Crocker v. Higgins*, 7 Conn. 342; *Collins v. Tillon's Adm'r*, 26 Conn. 368; *Bradshaw v. Coombs*, 102 Ill. 423; *Bradstreet v. Rich*, 73 Me. 233; *Lash v. Perlín*, 78 Mo. 391; *Lehndorf v. Schields*, 13 Mo. App. 486; *Green v. Randall*, 51 Vt. 67; *Risley v. Phoenix Bank of N. Y.*, 83 N. Y. 313; *Hutchins v. Hebbart*, 34 N. Y. 24; *Potter v. Hopkins*, 25 Barb. 416; *Willis v. Hubbert*, 117 Mass. 151; *Davenport v. Mason*, 15 Mass. 85; *Trevidick v. Mumford*, 31 Mich. 470; *Kemp v. Byne*, 54 Ga. 527; *Irwin v. Thompson*, 27 Kan. 643; *Cobb v. Wallace*, 5 Cold. (Tenn.) 539; *Bolc-*

A distinction has lately been made by the New York Courts,<sup>1</sup> between warranties as to existing state of things, and warranties relating to future condition and use, holding that, in the latter case, the warranty is an absolutely independent agreement, which may, therefore, be proved by parol evidence, although the sale had been consummated by a formal written bill of sale.<sup>2</sup> This distinction is not recognized by other authorities;<sup>3</sup> and, it must be said, in oppo-

*know v. Seymour*, 17 C. B. N. S. 107; *Shephard v. Haas*, 14 Kans. 443; *Thomas v. Hammond*, 47 Tex. 42; *Barclay v. Hopkins*, 59 Ga. 562; *Richards v. Fuller*, 37 Mich. 161; *Tisdale v. Harris*, 20 Pick. 9; *Brewster v. Countryman*, 12 Wend. 446; *Fisher v. Abeel*, 66 Barb. 381; *Thomas v. Nelson*, 69 N. Y. 118; *Sharp v. Rodebough*, 70 Ind. 547; *Kinney v. Whiton*, 44 Conn. 262; *Amonett v. Montague*, 63 Mo. 201; *Smith v. Shell*, 82 Mo. 215; *Havana R. R. Co. v. Wash*, 85 Ill. 58; *Tomlinson v. Bules*, 101 Ind. 538; *Smith v. O'Donnell*, 8 Lea, 468; *Brown v. Owen*, 94 Ind. 31; *Board v. Shipley*, 77 Ind. 553; *McCullough v. Girard*, 4 Wash. C. C. 289; *Barker v. Bradley*, 42 N. Y. 316; *K. M. Mfg. Co. v. Macalister*, 40 Mich. 84; *Wright v. McPike*, 70 Mo. 175; *Gordon v. Gordon*, 96 Ind. 134.

<sup>1</sup> *Chapin v. Dobson*, 78 N. Y. 82; *Eighmie v. Taylor*, 98 N. Y. 288.

<sup>2</sup> In *Chapin v. Dobson*, 78 N. Y. 82, where the oral warranty was that the machine should be so constructed as to do the buyer's work satisfactorily, *Danforth, J.*, said: "The written contract and the guaranty do not relate to the same subject-matter. The contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent, or of a particular designation, and another thing to undertake that they shall operate in a particular manner, or with a certain effect, or, as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or the specifications of the patent; and whether they did or did not conform thereto would be the only inquiry. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid and to be performed, and the consequences of a breach of the guaranty are a recoupment or abatement of damages in favor of the defendant, and this is so whether the contracts are in writing or not; for the guaranty is valid, although not in writing, and the same rule must apply, for in either case the relation of the guaranty to the contract would be the same."

<sup>3</sup> See *Mast v. Pearce*, 58 Iowa, 582; *Golpin v. Atwater*, 29 Conn. 98; *Maumberg v. Young*, 44 N. J. L. 331, where warranties, which relate to future as well as to present condition, were held to be provable by writ-



sition to its soundness, that if it was generally received, it would practically break away the rule requiring warranties to be proved by written evidence, for all the important warranties, except those which are confined to establishing the identity of the thing sold, relate to the future adaptation of the thing to the use of the purchaser. And, furthermore, a warranty as to the future condition of the thing is as essential an inducement to the sale, and hence a part of the contract as the price paid for the goods.<sup>1</sup>

It must be observed, that the foregoing inquiry into the admissibility of parol evidence to prove a warranty as a part of a contract of sale which has been reduced to writing, was confined to a consideration of warranties, which had been made prior to, or contemporaneous with, the execution of the contract of sale.

And, although it is true that a warranty given subsequent to the making of the sale, has no binding effect, unless it is supported by a fresh consideration, yet if the requisite consideration be present, the subsequent warranty will be binding, although it may be made orally. For a written contract may be limited or completely abrogated by a subsequent oral agreement.<sup>2</sup>

ten evidence, because the contracts of sale had been reduced to writing. The cases cited by the New York court in support of this distinction, were those, in which the memorandum was informal, and for that reason parol proof of the warranty was admissible. See *Jeffery v. Walton*, 1 Stark. 213; *Batterman v. Pierce*, 8 Hill, 171. In *Erskin v. Adeave* L. R. 8 Ch. App. 756; and *Morgan v. Griffith*, L. R. 6 Exch. 70, the warranties related exclusively to present condition, and could only be taken as holding that such warranties were required to be in writing, when the contract of sale had been reduced to writing.

<sup>1</sup> See Jones' *Construction of Commercial & Trade Contracts*, pp. 180-217.

<sup>2</sup> *Homer v. Life Ins. Co.*, 67 N. Y. 478; *Malone v. Dougherty*, 79 Pa. St. 46; *Courtenay v. Fuller*, 65 Me. 156; *Burt v. Sexton*, 1 Hun, 551; *Eden v. Blake*, 18 M. & W. 614; *Blanchard v. Trimm*, 38 N. Y. 225; *Pratt's Adm'r v. United States*, 22 Wall. 496; *Wiggin v. Goodrich*, 63 Me. 389; *Monahan v. Finn*, 13 Mo. App. 585.

§ 197. **Remedies for the breach of warranty.**— The essential distinction between conditions and warranties is in the character of the remedies for their breach, and in the effect of the breach of them on the contracts to which they are attached. The remedy for the breach of the condition, if it is a condition precedent, is the right to repudiate the contract, and if it is a condition subsequent, rescission.<sup>1</sup>

The breach of the warranty would logically be confined to an action for damages, for if the remedy of rescission or repudiation of the contract were recognized as the legitimate result of the breach of the warranty, the obligation of a warranty would not differ from the effect of a condition except in the grant to the buyer of the choice of remedies. The authorities do not however keep strictly within the limits imposed by logical distinctions, thus causing considerable confusion between the effect of conditions and of warranties, and the effect of refusal to accept performance of the contract.

In a previous chapter,<sup>2</sup> it has been explained that the contract of sale is not completely executed by the delivery, until the goods have been received and accepted by the buyer, and that the buyer has the right to reject the goods, if they are not what he had bought. If, therefore, the buyer has bought goods by sample or by description, upon receiving the goods, he may proceed to inspect them, and if they do not conform to the sample or to the description, he may reject them, and by notifying the seller of his decision, the goods are placed at the risk of the seller. The buyer may then either return the goods to the seller, or hold them for a reasonable time at the risk, and subject to the order, of the seller; and if the seller fails to make a disposition of the goods, the buyer has the right to sell them for the account of the seller.<sup>3</sup>

<sup>1</sup> See *post*, § 202.

<sup>2</sup> See *ante*, chapter IX, § 114.

<sup>3</sup> *Hellbut v. Hickson*, L. R. 7 C. P. 438; *Messmore v. N. Y. Shot Co.*,

Now, three views may be taken of these transactions: *first*, that there was want of performance of the principal contract of sale, in that the seller did not deliver what was bought;<sup>1</sup> *secondly*, that the failure of the goods which were delivered to conform to the sample or description, constituted the breach of an implied condition, and *thirdly*, that it was a breach of an implied or express warranty. Under the first two views no difficulty is experienced in recognizing the right of rejection as a consequence of the non-conformity of the goods to sample or description. And some of the authorities maintain that these are the only views that can be taken of the transaction.<sup>2</sup> But according to other authorities, the non-conformity of the goods to sample and description is to be treated as a breach of an implied warranty. There would hardly seem to be any necessity for an implied warranty in such cases, for the remedy under the theory of a breach of a condition precedent, as well as under that of a want of performance of the contract of the sale, was all-sufficient. And the uselessness of the doctrine of an implied warranty in such cases is made still more manifest, when, under the earlier cases, it is held that whenever the buyer accepts the goods, after he has had an opportunity to examine the goods, he is precluded from any further remedy for the want of con-

40 N. Y. 422; *Couston v. Chapman*, L. R. 2 H. L. C. 250; *Freeman v. Chute*, 3 Barb. 424; *Parke v. Morris Axe Co.*, 4 Lans. 103; *Pope v. Allis*, 115 U. S. 363; *Magee v. Billingsley*, 3 Allen, 679; *Lorymer v. Smith*, 1 Barn. & C. 1; *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Gill v. Kaufman*, 16 Kan. 571; *Brown v. Corp. of Lindsay*, 35 Up. Can. Q. B. 509; *Lucy v. Mouffet*, 5 H. & N. 233.

<sup>1</sup> See *Jones v. George*, 61 Tex. 345.

<sup>2</sup> See *Pope v. Allis*, 115 U. S. 363, 371; *Barr v. Gibson*, 3 M. & W. 390; *Okell v. Smith*, 1 Stark. 86; *Woodle v. Whitney*, 23 Wis. 25; *Fairfield v. Madison Mfg. Co.*, 38 Wis. 346; *Nichol v. Godts*, 10 Ex. 91; *Norrington v. Wright*, 115 U. S. 188, 203; *Filley v. Pope*, 115 U. S. 213, 219; *Boothby v. Scales*, 27 Wis. 626; *Gompertz v. Bartlett*, 2 El. & B. 849; *Chanter v. Hopkins*, 4 M. & W. 399, 404.

formity of the goods to sample or description.<sup>1</sup> But if the goods are consumed in the examination of them, the only remedy for the buyer is to claim damages for non-conformity to sample or description.<sup>2</sup>

It is true that there may be an express warranty of conformity to sample or description, which is exacted by the buyer for the very purpose of being relieved of the necessity of an immediate examination and rejection of the goods, if they are not up to sample. And the doctrine of implied warranty would be of value, if the remedy for the breach of it was not lost by an acceptance after an examination of the goods became possible. Hence, if the implied warranty is to be recognized at all, the later New York cases lay down the better rule, when they hold that the acceptance of the goods after an opportunity for examination, does not preclude the recovery of damages for the breach of the implied warranty that the goods will conform to sample or description.<sup>3</sup> The better statement of the law in this connection is that, as long as there is no acceptance of the goods, of the kind that constitutes a

<sup>1</sup> *McCormick v. Sarson*, 45 N. Y. 265; *Morse v. Brackett*, 98 Mass. 205; *Barnard v. Kellogg*, 10 Wall. 383; *Carson v. Baillie*, 19 Pa. St. 375; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Barton v. Kane*, 17 Wis. 38; *Reed v. Randall*, 29 N. Y. 358, 368; *Sprague v. Blake*, 20 Wend. 61. The buyer's remedies for breach of the warranty will not be affected by his acceptance of the goods, where the acceptance is induced by fraud or artifice, which in any way prevented or hindered an examination of the goods. *Dutchess Co. v. Harding*, 49 N. Y. 321; *Mody v. Gregson*, L. R. 4 Ex. 49. Nor will the buyer's acceptance of a part of the goods prevent his rejection of the remainder which is subsequently delivered. *Hubbard v. George*, 49 Ill. 275; *Farmer v. Gray*, 20 Neb. 403. But an inspection of a part will preclude subsequent rejection of the remainder, if the whole is accepted in reliance upon the partial examination. *Dutchess v. Harding*, 49 N. Y. 321; *Barton v. Kane*, 17 Wis. 38.

<sup>2</sup> *Jones v. George*, 61 Tex. 345.

<sup>3</sup> *Briggs v. Hilton*, 99 N. Y. 517; *Kent v. Friedman*, 101 N. Y. 616; *Day v. Pool*, 52 N. Y. 416; *Gurney v. Atlantic Ry. Co.*, 58 N. Y. 358; *Gautier v. Douglass, &c., Co.*, 18 Hun, 514; *Marshuetz v. McGreevy*, 28 Hun, 408.

complete execution of the contract of sale<sup>1</sup> the failure of the goods to conform to the sample or description constitutes a breach of an implied condition precedent. But if a rejection and return of the goods become impracticable, either through consumption in examination or by acceptance without examination, then the buyer's remedies still survive for the breach of the warranty.<sup>2</sup>

If the warranty is express, and more particularly, if it relates to the future condition or use of the thing sold, or its conformity to the warranty can only be determined by a more or less prolonged use of it, the logical difficulties are not so great. And without a consideration of the practical reasons, assigned by some of the cases for holding otherwise,<sup>3</sup> the conclusion would be easily reached that the only remedy for the breach of warranties of this kind, is an action for damages. And this is the conclusion of the English and many American authorities.<sup>4</sup> But in a majority of the American States, for the purpose of avoiding circuitry of action, as it is claimed, the buyer may, even after acceptance of the goods, bring his action for breach of warranty, rescind the contract of sale and return the goods in place of bringing his action for damages.<sup>5</sup>

<sup>1</sup> See *ante*, § 115.

<sup>2</sup> See *Wolcott v. Mount*, 36 N. J. L. 262; *Jones v. George*, 61 Tex. 345; *Behn v. Burness*, 3 Best & Smith, 755; *Ellen v. Topp*, 6 Ex. 424-441; *Graves v. Legg*, 9 Ex. 709-716; *Boone v. Eyre*, 1 H. Bl. 273; *Elliott v. Von Glehn*, 10 C. B. (N. s.) 844.

<sup>3</sup> See further on in same section.

<sup>4</sup> *Street v. Blay*, 2 Barn. & Ad. 456; *Mondell v. Steel*, 8 M. & W. 358; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Dawson v. Collis*, 10 C. B. 530; *Day v. Pool*, 52 N. Y. 416; *Messmore v. N. Y. Shot, &c., Co.*, 40 N. Y. 422; *Lawton v. Kell*, 61 Barb. 558; *Briggs v. Hilton*, 99 N. Y. 517; *Freyman v. Knecht*, 78 Pa. St. 141; *Bunce v. Beck*, 48 Mo. 279; *Lyon v. Bertram*, 20 How. 149.

<sup>5</sup> *Dorr v. Fisher*, 1 Cush. 271; *Morse v. Brackett*, 98 Mass. 209; *Marshall v. Perry*, 67 Me. 78; *Rogers v. Hanson*, 35 Iowa, 283; *Gates v. Bliss*, 43 Vt. 299; *Youghlogheny Iron Co. v. Smith*, 66 Pa. st. 340; *Marsh v. Low*, 55 Ind. 271; *Paulson v. Osborn*, 27 N. W. Rep. (Minn.) 203; *Moral*

The action for damages may not only be an independent action for the breach of the warranty, but the claim for damages may be set up as a set-off or counter-claim in the seller's action for the price.<sup>1</sup>

*School Township v. Harrison*, 74 Ind. 93; *Dill v. Ferrell*, 45 Ind. 268; *O'Malley v. Hendrickson*, 29 N. J. L. 371; *Ralph v. Chicago, &c., Co.*, 32 Wis. 177; *Butler v. Northumberland*, 50 N. H. 33; *Jack v. Des Moines R. R. Co.*, 53 Iowa, 399; *Hyatt v. Boyle*, 5 Gill. & J. 121; *Marston v. Knight*, 29 Me. 341; *Bryant v. Isburgh*, 18 Gray, 637.

<sup>1</sup> *Coventry v. McEviry*, 13 Ir. Com. L. Rep. 160; *Morrill v. Nightingale*, 39 Wis. 247; *Getty v. Rountree*, 2 Pinn. 379; 2 Chand. 28; *Smith v. Dunham*, 2 Kerr. 630.

## CHAPTER XV.

### CONDITIONS AND CONDITIONAL SALES.

**SECTION 200. Conditional-sales defined — Kinds of conditions.**

201. Words necessary to create a conditional sale.
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203. Sales upon condition distinguished from consignments — Conditional sales disguised as leases.
204. Sales upon condition distinguished from chattel mortgages — Sales with the right to repurchase.
205. Preparation of goods for delivery by vendor, as a condition precedent.
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212. Sales dependent upon the acts of others.
213. Sales on trial — Sale or return — What constitutes a satisfactory sale.
214. Sale of goods to arrive.
215. Correspondence of bulk with sample or description — Genuineness of commercial securities.
216. Remedies for the breach of a condition.
217. Waiver of conditions — Effect of delivery in cash transactions — Effect of delay in enforcing forfeiture.
218. Impossibility of performance — Illegality of condition — Obstruction of performance by other party.
219. Equitable relief against forfeiture.

**§ 200. Conditional sales defined — Kinds of conditions.** — A conditional sale is one by which the right of property in chattels is made to vest, to be modified or

defeated upon the happening or not happening of some event.<sup>1</sup>

If the right of property is to be vested or enlarged upon the performance of the condition, and not before, it is called a condition precedent; if the condition is to defeat or cut down an estate already vested, it is a condition subsequent. If in a contract of sale the execution of it by one of the parties is made conditional upon its performance by the other, the condition is said to be mutual or concurrent, but it is only a complex condition precedent.<sup>2</sup> It is not always an easy matter to determine, in a given case, whether a condition is precedent or subsequent. The parties do not always use language sufficiently definite, to enable this distinction to be made with any certainty. The question does not seem to have been raised to any extent, if at all, in the construction of conditional sales of personal property,<sup>3</sup> the recorded cases having arisen out of conveyances and devises of real estate upon condition; but, although it may be seldom that the difficulty arises in the case of the transfer of personal property, when it does arise, it may be solved by the application of the same rule, which governs the question in the law of real property.<sup>4</sup> The rule, by paraphrasing an extract from the decision of one of the real estate cases<sup>5</sup> may be stated as follows: "If the act or

<sup>1</sup> 1. Bouvier Law Dict., Condition, 812; Tiedeman Real Prop., § 271; 2 Wash. Co. on Real Prop. 2; Co. Lit. 201a; 2 Schouler on Personal Prop., §§ 277-284.

<sup>2</sup> See, generally, on the kinds of conditions, *Hickman v. Shimp*, 109 Pa. St. 16; *Redman v. Etna. Ins. Co.*, 49 Wis. 438; *Sedden v. Pringle*, 17 Barb. 466; *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 442; *Fishback v. Van Dusen*, 33 Minn. 111, 116; *Cadwell v. Blake*, 6 Gray, 402; *Chapin v. School District*, 35 N. H. 450; *N. & N. W. R. R. Co. v. Jones*, 2 Cold. 584; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Withers v. Reynolds*, 2 Barn. & Ad. 882.

<sup>3</sup> See *Carpenter v. Scott*, 13 R. I. 477.

<sup>4</sup> See Tiedeman on Real Prop., § 273.

<sup>5</sup> *Underhill v. Saratoga, &c.*, R. R. Co., 20 Barb. 455. See, also, *Finlay v. King's lessee*, 3 Pet. 340; *Hayden v. Stoughton*, 5 Pick. 528;



condition required do not necessarily precede the transfer of title to the goods, but may accompany or follow it, and if the act may as well be done after, as before, the transfer of title; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the title shall pass, and the buyer perform the act, after taking possession, then the condition is subsequent.<sup>2</sup> Conditions are also divided into *express* and *implied*. An express condition is, as its name implies, one which is expressly created and annexed to the sale; while an implied condition is not expressly declared, but arises by implication of law as incidents of sales in general, or of certain sales.<sup>1</sup> The annexation of a condition subsequent to a sale of personal property does not restrict the transfer of the property by the conditional vendee, except that the purchaser from the vendee will take the property subject to the possibility of forfeiture for the breach of the condition.<sup>3</sup>

§ 201. Words necessary to create a conditional sale. —

No particular words or forms of expression are really necessary for the creation of a conditional sale. Any words, which indicate an intention to annex a condition to the sale, will be sufficient. Such phrases, however, as “on condition,” “provided,” “if it shall so happen,” etc., are found

*Austin v. Cambridgeport Parish*, 21 Pick. 215; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Horsey v. Horsey*, 4 Harr. 517; *Jones v. Walker*, 13 B. Mon. 163; *Jones v. Doc*, 2 Ill. 276; *Barksdale v. Elam*, 30 Miss. 694; *Monroe v. Bowen*, 26 Mich. 523; *Rogan v. Walker*, 1 Wis. 527; *Hunt v. Beeson*, 18 Ind. 382; *Waters v. Bieden*, 70 Pa. St. 235; *Barruss v. Madan*, 2 Johns. 145; *Wheeler v. Walker*, 2 Conn. 201; *Marwick v. Andrews*, 25 Me. 525; *Taylor v. Maxon*, 9 Wheat. 325.

<sup>1</sup> See *post*, §§ 205-207, for examples of implied conditions in sales. See, also, *Tiedeman on Real Prop.*, § 271.

<sup>2</sup> See *Wilson v. Wilson*, 38 Me. 18; *Underhill v. Saratoga, &c., R. R. Co.*, 20 Barb. 45; *Taylor v. Sutton*, 15 Ga. 103. These cases are taken from the law of real property, but the principle of the text applies with equal, if not greater, force to the conditional sale of personal property.

in constant use, in the making of conditional sales, and, if employed, will usually remove any doubt as to the sale or transfer being conditional. But whether these expressions are used or not, if the intention of the parties, to make the sale dependent upon the happening of some event or the performance of some collateral obligation, can be ascertained from the expressions of the parties, it will be a conditional sale, it matters not what may be the language used.<sup>1</sup> In the case of dispositions of personal property by will, it is more difficult, than in sales, to determine whether they are conditional, because the language used by testators is ordinarily looser and more inexact. But inasmuch as a consideration of these transfers is not within the limits of the subject of the present volume, nothing more than a passing reference to it is permissible.

§ 202. **Conditions distinguished from warranties.**— In a previous chapter,<sup>2</sup> the subject of warranties has been fully treated, and during a discussion of some of the implied warranties, it was shown how the courts had created confusion in failing to distinguish between conditions and warranties,<sup>3</sup> and the matter will be discussed again from the standpoint of conditions.<sup>4</sup> The settlement of this question, so far as it relates to implied conditions, is a matter of implication of law, and irrespective of the intentions of the parties. Whether an express condition has been created or not depends upon the intention of the parties.

If the parties intended to annex a condition to the sale, then the parties must have intended that the title shall not pass until the condition is performed, or shall be defeated

<sup>1</sup> See *Goldsborough v. Orr*, 8 Wheat. 217; *Gill v. Weller*, 52 Md. 8; *Kane v. Hood*, 13 Pick. 281; *Tipton v. Feitner* 20 N. Y. 423; *Isaacs v. N. Y. Plaster Works*, 57 N. Y. 124.

<sup>2</sup> See *ante*, Chap. XIV.

<sup>3</sup> See *ante*, § 197.

<sup>4</sup> See *post*, § 216.

when the condition is broken. Whereas a warranty is simply an undertaking that the seller will be responsible to the buyer for all damage which the latter may suffer from the misrepresentation of the seller. The breach of a warranty in no wise affects the title of the vendee to the goods, unless the language, which creates the warranty, also creates a condition. And this may be done, by employing in the same sentence words of condition as well as words of assurance. Thus, it is quite common in deeds of conveyance, to precede a clause by the phrase: "Provided, and it is hereby agreed or guaranteed that," etc. Under these circumstances, the clause which follows would be a condition, because of the presence of the word "provided," which shows the intention to create a condition, and a covenant of warranty, because of the words of contract.

§ 203. Sales upon condition distinguished from consignments — Conditional sales disguised as leases. — A sale may be made so that the title to the goods shall remain in the vendor, until the performance of the condition, although the possession be given to the vendee. But such a conditional sale is liable to be confounded with a consignment to sell. If the agreement of the parties, when the possession is transferred, is that the transferee is to have the title, whenever the condition — it may be the payment of the price — is performed, it is a conditional sale; but if the agreement is that the transferee must take the goods and sell them for the account of the transferor, it will be a consignment of goods to sell, a bailment and not a conditional sale, although the transferee may be authorized by the terms of the contract to be a purchaser of the goods.<sup>1</sup>

<sup>1</sup> See *Waters v. Butterick*, 105 Mass. 287; *Nutter v. Wheeler*, 2 Low. C. C. 346; *Fish v. Benedict*, 74 N. Y. 618; *In re Linforth*, 4 Sawy. C. C. 370; *Audenried v. Betteley*, 8 Allen, 302.

The purpose of a conditional sale, in which the title is not to pass until the price is paid, although possession is given to the vendee, is to enable the vendor to recover the property, in case the price is not paid. If the property remains in the vendee's hands, it can be recovered by the vendor on the breach of the condition, and in most of the States it could be recovered, although the property had passed into the hands of a *bona fide* purchaser.<sup>1</sup> But in several of the States, including Pennsylvania, New York, and at one time Alabama, the conditional vendee was held to be able to transfer a good title to a *bona fide* purchaser, and thus the conditional sale would not be a very good security for the payment of the price. In consequence of this danger, the vendors of sewing machines, pianos, organs and furniture, prepared an instrument in writing in the form of a lease, whereby it appeared that the vendor had leased the subject-matter of the transaction upon the payment at stated periods of what was called rent; that upon any default in the payment of this "rent," the vendor or lessor was entitled to recover the possession of what had not ceased to be his property, and that when the last periodical payment is made, the thing was to become the property of the "lessee." From the four corners of the instrument, from the language, as well as from the relation of the parties to the thing, it is plain that a conditional sale was intended, and was disguised as a lease, in order to prevent the loss of the goods on default of payment, by a transfer of them to a *bona fide* purchaser.<sup>2</sup> If the periodical payment was of "rent," then the ultimate transfer of the property, if that was to be considered as an independent transaction, was without consideration, for the so-called

<sup>1</sup> See *post*, Chap. XXI.

<sup>2</sup> *Hervy v. Locomotive Works*, 93 U. S. 684, Davis, J.: "It was evidently not intended that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last installment."

“rent” will have become executed by the time that the agreement to transfer goes into effect; and if the transfer of title is supported by the same consideration, then the rights of the parties must have become fixed at the time that the contract was made, and there is no escape from the conclusion that, the principal part of the transaction being the transfer of the title, the transaction is a sale upon condition that the title to the goods is not to pass until the price is paid. A man can acquire title to goods, in consideration of a sum or sums of money, by only one transaction, and that is, a sale. No one ever acquired a title to goods by a lease. If the option was given to the “lessee” of ultimately buying the goods at a stipulated price, and in the meanwhile the possible vendee is to hire the property at a rental,—which is something different from and independent of, the price to be paid for the goods if the “lessee” ultimately decides to buy—the transaction is undoubtedly a bailment, until the bailee or “lessee” decides to buy.<sup>1</sup> But in these so-called “leases” by these periodical payments of “rent,” the “lessee” is by degrees performing the condition upon the full performance of which he is to become the owner of the property, and the present possession is a mere incident of the ultimate transfer of the title. A disguise cannot change the substance of things.

In order, however, to give to the vendor a full protection

<sup>1</sup> In *Forrest v. Nelson*, 19 Rep. (Pa.) 380, Sterrett, J., says; “A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may become owner of the property upon payment of a price agreed upon. As between the parties to such contracts both are valid and binding; but as to creditors, the latter is good, while the former is invalid.”

against a disposition of the property by the buyer to a *bona fide* purchaser, from whom the vendor could not recover it upon the breach of the condition,<sup>1</sup> the courts have in several of the States held that these dubious transactions were present leases with the conditional right of sale *in futuro*.<sup>2</sup> But in most of the States, the conditional vendee cannot give a *bona fide* purchaser any better title than what he has, and hence in these States, it is held that these transactions, although disguised as leases, are essentially conditional sales, and that they must be considered to be such for all purposes.<sup>3</sup>

§ 204. Sales upon condition distinguished from chattel mortgages — Sale with right to repurchase. — It is very often difficult to distinguish between a chattel mortgage, and a sale with the conditional right to repurchase the property; and often the attempt is made to disguise a chattel mortgage as a conditional sale of the kind described, in order to escape from the statutory regulation of the mortgage. And, apart from the statutory regulations concerning the mortgage, it is important to distinguish between chattel

<sup>1</sup> See *post*, Chap. XXI.

<sup>2</sup> Chamberlain v. Smith, 44 Pa. St. 481; Rowe v. Sharp, 51 Pa. St. 26; Crist v. Kleber, 79 Pa. St. 290; Enlow v. Klein, 79 Pa. St. 488; Becker v. Smith, 59 Pa. St. 469; Henry v. Patterson, 57 Pa. St. 346; Forrest v. Nelson, 19 Rep. (Pa.) 380; McCall v. Powell, 64 Ala. 254. See also Sargent v. Giles, 8 N. H. 325; Bailey v. Colby, 34 N. H. 29; Haviland v. Johnson, 7 Daly, 297; Austin v. Dye, 46 N. Y. 500; Bean v. Edge, 84 N. Y. 510. But see Stadfeldt v. Huntsman, 92 Pa. St. 53.

<sup>3</sup> Hervey v. Locomotive Works, 98 U. S. 664; Hine v. Roberts, 48 Conn. 267; Carpenter v. Scott, 13 R. I. 477; Price v. McCallister, 3 Grant (Pa.), 248; Cole v. Berry, 42 N. J. L. 308; Murch v. Wright, 46 Ill. 487; Sumner v. Cattey, 71 Mo. 121; Kohler v. Hayes, 41 Cal. 455; Domestic Sewing Machine Co. v. Anderson, 23 Minn. 57; Hegler v. Eddy, 58 Cal. 597; Singer Co. v. Holcombe, 40 Iowa, 33; Lucas v. Campbell, 88 Ill. 447; Singer Mfg. Co. v. Cole, 4 Lea, 439; Greer v. Church, 13 Bush, 430; Whitcomb v. Woodworth, 54 Vt. 544; Loomis v. Bragg, 50 Conn. 228; Myer v. Car. Co., 102 U. S. 1; Heryford v. Davis, 102 U. S. 235. See Stadfeldt v. Huntsman, 92 Pa. St. 53. See, also, *ante*, § 9.

mortgages and the sale with right to repurchase, in that the mortgagor may redeem his property even after condition broken, whereas in the sale with right to repurchase, the repurchase must be made if at all within the time agreed upon. The vendor cannot claim the right to repurchase the property, after the title of the vendee has become absolute by the breach of the condition.<sup>1</sup> The test for determining the character of these doubtful transactions is as follows: If the transfer is made for the purpose of securing the payment of an existing debt, it is a mortgage; it matters not what may be the form of the transaction. But if there is no debt at all, or the sale extinguishes the debt, and the right to repurchase is an independent collateral interest, then the transaction is a conditional sale, and not a mortgage.<sup>2</sup> Where it is doubtful whether the transaction is a mortgage or conditional sale, the courts lean in favor of the construction which makes the transaction a mortgage; for there is less damage resulting from an erroneous construction in that direction, than if the error was made

<sup>1</sup> See *post*, Chapter XVI. for a discussion of Chattel Mortgages.

<sup>2</sup> "A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action, a subsequent or contemporaneous stipulation in the interest of the debtor, securing to him an opportunity to re-acquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale." *Currier, J., in Turner v. Kerr*, 44 Mo. 429. See, also, to same effect, *Parish v. Gates*, 29 Ala. 254; *Houser v. Camp*, 3 Pa. St. 208; *Blodgett v. Blodgett*, 52 Vt. 82; *Robinson v. Willoughby*, 65 N. C. 520; *Reeves v. Sebern*, 16 Iowa, 234; *Muogat v. Pumpelly*, 46 Wis. 660; *Moore v. Murdock*, 26 Cal. 514; *Slowey v. McMurray*, 27 Mo. 113; *Cooper v. Brock*, 41 Mich. 488; *Ruffler v. Womack*, 30 Tex. 332; *Wilmerding v. Mitchell*, 13 Vroom, 476; *Todd v. Campbell*, 32 Pa. St. 250; *Smith v. Beattie*, 31 N. Y. 542. Where the relation of debtor and creditor had never existed between the parties, the transaction must be a sale with right to repurchase, and cannot be a mortgage. *Conway v. Alexander*, 7 Cranch, 218; *Thompson v. Chumney*, 8 Tex. 389; *Glover v. Payne*, 19 Wend. 518; *Logwood v. Hussey*, 60 Ala. 417.

in the other direction, and a mortgage was construed to be a conditional sale.<sup>1</sup>

The same difficulty of distinguishing sales with right to repurchase from mortgages is experienced in the law of real estate mortgages,<sup>2</sup> and there it is held that the answer to the question depends upon the facts and circumstances of each case. Among the circumstances which tend to establish the presumption that the transaction is a mortgage, are the inadequacy of the consideration, the continued possession of the vendor, the necessities or financial embarrassments of the vendor; while the adequacy of the consideration, the possession of the vendee, the existence of other securities for the payment of the consideration of the original sale, go to prove that it was a conditional sale, or that the grantor has only the right to repurchase.<sup>3</sup>

<sup>1</sup> *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254. See, also, to same effect, in regard to real estate mortgages, *Russell v. Southard*, 12 How. 139; *Eaton v. Green*, 22 Pick. 526; *Crane v. Bonnell*, 1 Green Ch. 264; *Baughner v. Merriman*, 32 Md. 185; *Bacon v. Brown*, 19 Conn. 34; *Turnipseed v. Cunningham*, 16 Ala. 501; *Cottrell v. Long*, 20 Ohio, 464; *Gillis v. Martin*, 2 Dev. Eq. 470; *O'Neill v. Capelle*, 62 Mo. 209; *Turner v. Kerr*, 44 Mo. 429; *Heath v. Williams*, 30 Ind. 498; *Scott v. Henry*, 13 Ark. 112; *Sweetland v. Sweetland*, 3 Mich. 645; *Trucks v. Lindsay*, 18 Iowa, 504; *Ward v. Deering*, 4 Mon. 44. See, also, some doubtful cases, which were held to be conditional sales.

<sup>2</sup> See *Tiedeman on Real Prop.*, § 305.

<sup>3</sup> The following cases refer to sales of real estate, but the same principles apply to conditional sales of personalty. *Williams v. Owen*, 5 Mylne & C. 303; *Haines v. Thompson*, 70 Pa. St. 442; *Hiester v. Madeira*, 3 Watts & S. 384; *Baker v. Thrasher*, 4 Denio, 493; *Slowey v. McMurray*, 31 Mo. 113; *Conway v. Alexander*, 7 Cranch, 218; *Holmes v. Grant*, 3 Paige Ch. 248; *Russell v. Southard*, 12 How. 139; *Waters v. Randall*, 6 Met. 479; *Todd v. Hardie*, 5 Ala. 698; *West v. Hendrix*, 28 Ala. 226; *Lockett v. Townshend*, 3 Tex. 119; *Edington v. Harper*, 3 J. J. Marsh. 358; *Davis v. Stonestreet*, 4 Ind. 101; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Bennett v. Holt*, 2 Yerg. 6; *Flagg v. Mann*, 14 Pick. 467; *Low v. Henry*, 9 Cal. 538; *Warren v. Lovis*, 53 Me. 463; *Ransone v. Frayser*, 10 Leigh, 592; *Gibson v. Eller*, 13 Ind. 124; *Campbell v. Dearborn*, 109 Mass. 130; *Thompson v. Banks*, 2 Md. Ch. 430; *Freeman v. Wilson*, 51 Miss. 329; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Garr v. Rising*, 62 Ill. 14; *Pearson v. Seay*, 35 Ala. 612; *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Trucks v. Lindsey*,



If there is no debt prior to the transaction, and the parties by their language indicate an intention that the vendee shall not acquire an absolute title until the purchase-money is paid, the transaction is undoubtedly a conditional sale, dependent upon the condition precedent of the payment of the purchase-money, and not a mortgage.<sup>1</sup>

§ 205. **Preparation of goods for delivery by vendor, as a condition precedent.** — While it is not always the duty of the vendor to deliver the goods to the vendee, before he can hold the vendee liable on the contract of sale,<sup>2</sup> yet the liability of the vendee is always dependent upon the condition precedent, unless changed by express agreement of the parties, that the vendor has done every thing necessary to make the goods ready for delivery to the vendee. Not only, under this general rule, is it necessary for the vendor to complete the manufacture of the goods, if they were to have been made expressly for the vendee,<sup>3</sup> and to put the goods generally into a deliverable condition,<sup>4</sup> but it is also necessary for the goods sold to be separated from the bulk of stock, and weighed, counted or measured, before the vendee can be held bound by the contract.<sup>5</sup> But it is the

18 Iowa, 504; *Gibbs v. Penny*, 43 Tex. 560; *Crews v. Threadgill*, 35 Ala. 334; *Wilson v. Patrick*, 34 Iowa, 361; *Daubenspeck v. Platt*, 22 Cal. 330.

<sup>1</sup> In *Clayton v. Hester*, 80 N. C. 275, an instrument signed and sealed by B. promising to pay C. \$150 "for one bay horse bought of him, and to secure him the horse stands his own security" was held to be a conditional sale. See, also, similar cases, in *Worthy v. Cole*, 69 N. C. 157; *Rowan v. Union Arms Co.*, 36 Vt. 124.

<sup>2</sup> See *ante*, § 94.

<sup>3</sup> *Comfort v. Kiersted*, 26 Barb. 472; *Williams v. Jackman*, 16 Gray, 514; *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. 517; *Andrews v. Durant*, 11 N. Y. 35.

<sup>4</sup> *Elgee Cotton Cases*, 22 Wall. 180; *Bond v. Greenwald*, 51 Tenn. 453; *Keeler v. Vandervere*, 5 Lans. 313; *Groffe v. Belche*, 62 Mo. 400; *McClung v. Kelly*, 21 Iowa, 508; *Cleaver v. Ogle*, 1 Houst. 453; *Wilkinson v. Holiday*, 33 Mich. 336; *Foster v. Ropes*, 111 Mass. 10; *Pritchett v. Jones*, 4 Rawle, 260; *Smith v. Parkman*, 55 Miss. 649.

<sup>5</sup> *Stone v. Peacock*, 35 Me. 385; *Messer v. Woodman*, 22 N. H. 172;

necessity of preparing the goods for delivery which makes these things conditions precedent to the vendee's liability on the contract of sale, and not the obligation to do them. If, therefore, the goods are actually delivered to the vendee, he is liable on the contract for the price, although something still remains to be done by the vendor to the goods, in order to put them in shape as called for by the contract.<sup>1</sup>

But the intention of the parties will always govern, if it can be definitely ascertained. And if it be shown that the parties intended that the vendee should acquire title to the goods, before they have been delivered or prepared for delivery, their intention will be carried out.<sup>2</sup>

*Fuller v. Bean*, 34 N. H. 290; *Ockington v. Richey*, 41 N. H. 275; *Sherwin v. Mudge*, 127 Mass. 547; *Rapelye v. Mackie*, 6 Cow. 250; *Kein v. Tuppler*, 52 N. Y. 550; *Nicholson v. Taylor*, 31 Pa. St. 128; *Hudson v. Weir*, 29 Ala. 294; *Chamblee v. McKenzie*, 31 Ark. 155; *Commercial Bank v. Gillette*, 90 Ind. 268; *O'Keefe v. Kellogg*, 15 Ill. 847; *Courtright v. Leonard*, 11 Iowa, 32; *Obe v. Carson*, 62 Mo. 209; *Martin v. Hurlbut*, 9 Minn. 142; *Lingham v. Eggleston*, 27 Mich. 324; *Cunningham v. Ashbrook*, 20 Mo. 553; *Frost v. Woodruff*, 54 Ill. 155; *Moffatt v. Green*, 9 Ind. 198; *Beller v. Block*, 19 Ark. 566; *Devane v. Fennell*, 2 Ired. 36; *Nesbit v. Burry*, 25 Pa. St. 208; *Outwater v. Dodge*, 7 Cow. 85; *Andrew v. Dieterich*, 14 Wend. 31; *Riddle v. Varnum*, 20 Pick. 280; *Gilman v. Hill*, 36 N. H. 311; *Smart v. Batchelder*, 57 N. H. 140; *Handlette v. Tallman*, 2 Shep. (Me.) 400.

<sup>1</sup> See *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Mount Hope Iron Co. v. Buffington*, 103 Mass. 62; *Goddard v. Brinney*, 115 Mass. 450; *Greaves v. Hepke*, 2 B. & Ald. 131; *Macomber v. Parker*, 13 Pick. 175; *Haxall v. Willis*, 15 Gratt. 434; *Cunningham v. Ashbrook*, 20 Mo. 555. In *Macomber v. Parker*, the court say: "Where the goods are actually delivered, that shows the intention of the parties to complete the sale by delivery; and the weighing or counting or measuring afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement of the price. The sale would be as complete as a sale upon credit before the actual payment of the price."

<sup>2</sup> *Hurff v. Hires*, 40 N. J. L. 581; *Graff v. Fitch*, 58 Ill. 373; *Young v. Matthews*, L. R. 2 C. P. 127; *Turley v. Bates*, 2 Hurl. & Colt. 200; *Chapin v. Potter*, 1 Hilt. 366.

§ 206. **Conditions precedent to be performed by purchaser—Prepayment as a condition.**—The vesting of the title to the goods in the purchaser may be made to depend upon his performance of some condition. And if that be the nature of the transaction, a transfer of the possession before the performance of the condition does not pass the title. The condition precedent, which the purchaser is required to perform before acquiring the title, is the payment of the price. Where that condition is express, the title does not pass before payment of the price, although the possession is given to the purchaser.<sup>1</sup> But there may be other conditions, which the purchaser may be required to perform before acquiring title, such as the

<sup>1</sup> Fosdick v. Shall, 99 U. S. 250; Rogers v. Whitehouse, 71 Me. 222; Holt v. Holt, 58 N. H. 276; Manwell v. Briggs, 17 Vt. 176; Burrell v. Marvin, 44 Vt. 277; Sargent v. Metcalf, 5 Gray, 306; Salomon v. Hathaway, 126 Mass. 482; Brown v. Fitch, 43 Conn. 512; Herring v. Hoppock, 15 N. Y. 409; Ballard v. Burgett, 40 N. Y. 314; Cole v. Mann, 61 N. Y. 1; Cole v. Berry, 42 N. J. L. 308; Hartley v. Decker, 89 Pa. St. 470; Leavell v. Robinson, 2 Leigh, 161; Vasser v. Buxton, 86 N. C. 335; Talmadge v. Oliver, 14 S. C. 522; Boyd v. Lofton, 34 Ga. 494; Ketchum v. Brennan, 53 Miss. 596; Patton v. McCane, 15 B. Mon. 555; Price v. Jones, 3 Head, 84; Fleck v. Warner, 25 Kan. 492; Sanders v. Keber, 28 Ohio St. 630; Bradshaw v. Warner, 54 Ind. 58; Bailey v. Harris, 8 Clarke (Iowa), 331; Little v. Page, 44 Mo. 412; Wrangler v. Franklin, 70 Mo. 659; Hunter v. Warner, 1 Wis. 141; Putnam v. Lamphier, 36 Cal. 151; Cardinal v. Edwards, 5 Nev. 86; Aultman v. Mallory, 5 Neb. 178; McClelland v. Nichols, 24 Minn. 176; Fifield v. Elmer, 25 Mich. 48; Ridgeway v. Kennedy, 52 Mo. 24; Moseley v. Shattuck, 43 Iowa, 540; Van Duzor v. Allen, 90 Ill. 499; Forrest v. Hamilton, 98 Ind. 91; Carroll v. Wiggins, 80 Ark. 402; Sumner v. McFarlan, 15 Kan. 600; Vaughn v. Hopson, 10 Bush, 337; Christian v. Bunker, 38 Tex. 234; Dudley v. Abner, 52 Ala. 572; Jowers v. Blandy, 58 Ga. 379; Bennett v. Sims, 1 Rice, 421; Clayton v. Hester, 80 N. C. 279; Walsh v. Taylor, 39 Md. 592; Enlow v. Klein, 79 Pa. St. 488; Boon v. Moss, 70 N. Y. 465; Austin v. Dye, 46 N. Y. 500; Herring v. Willard, 2 Sandf. 418; Hine v. Roberts, 48 Conn. 267; Goodell v. Fairbrother, 12 R. I. 233; Skelton v. Manchester, 12 R. I. 326; Benner v. Puffer, 114 Mass. 376; Coghill v. Railroad, 3 Gray, 545; Root v. Lord, 28 Vt. 568; Weeks v. Pike, 60 N. Y. 447; Luey v. Bundy, 9 N. H. 298; George v. Stubbs, 26 Me. 243.

giving of note and mortgage for the price,<sup>1</sup> or that a house which was sold shall be removed from the premises within a given time,<sup>2</sup> or, in a deed of trust to secure payment of a debt, that the owner of the property shall be given due notice of the time and place of sale.<sup>3</sup>

§ 207. **Mutual or concurrent conditions — Sales for “cash on delivery.”** — Unless the parties have expressly agreed otherwise, the law implies that the liability of each party is conditional upon the other party's performance of, or readiness to perform, the contract. This is the case with the contract of sale, as with other contracts. The seller cannot hold the buyer liable on the contract, unless he is willing and ready to deliver the goods; and the buyer cannot hold the seller liable unless he is ready and willing to perform his part of the contract.<sup>4</sup>

If there is no agreement as to time or place of delivery of the goods, it is presumed that the delivery is to be made within a reasonable time and at the store or warehouse of the seller, and the seller has only to make the goods ready for delivery to the purchaser when he calls for them.<sup>5</sup> But where the seller expressly agrees to deliver the goods at a future day certain, the seller must seek the buyer and make a tender of the goods, although no place of delivery is agreed upon.<sup>6</sup> And so it is with the buyer's obligation

<sup>1</sup> *Congar v. Railroad*, 17 Wis. 477; *Thorpe v. Fowler*, 57 Iowa, 541.

<sup>2</sup> *Shaw v. Carbrey*, 18 Allen, 462.

<sup>3</sup> *Henderson v. Galloway*, 8 Humph. 692.

<sup>4</sup> *Dana v. King*, 2 Pick. 155; *Jones v. Marsh*, 22 Vt. 144; *Gazley v. Price*, 16 Johns. 267; *Williams v. Healey*, 8 Denio, 368; *Campbell v. Gittings*, 19 Ohio, 347; *Simmons v. Green*, 35 Ohio St. 104; *Robinson v. Tyson*, 46 Pa. St. 286; *Summers v. Sleeth*, 45 Ind. 598; *Cornwall v. Height*, 8 Barb. 327; *Smith v. Lewis*, 26 Conn. 110; *Swan v. Drury*, 22 Pick. 485; *Howe v. Huntington*, 15 Me. 350.

<sup>5</sup> *Lobdell v. Hopkins*, 5 Cow. 516; *Phelps v. Hubbard*, 51 Vt. 469; *Wilmouth v. Petton*, 2 Bibb. 280.

<sup>6</sup> *Barr v. Myers*, 3 Watts & S. 299; *Roberts v. Beatty*, 2 Pen. & Watts,

to pay the price. If no other express agreement is made, it is presumed that the sale is for cash, and the seller is not liable to the buyer on the contract of sale, unless tender is made of the price. The payment of the price must precede the demand for the goods.<sup>1</sup>

The condition of prepayment of price is considered as waived by a delivery of the goods, unless the parties have expressly agreed that the title shall not pass, although the possession is given to the buyer.<sup>2</sup> But if the possession is obtained by the buyer with the understanding that the payment of the price must follow immediately, then the delivery is only conditional, and the title does not pass until the price is paid.<sup>3</sup>

**§ 208. Condition as to time and place of performance.** — If the contract of sale is made upon the condition that it be performed within the time stipulated, and at the place stated in the contract, the failure to perform in the stipulated time and at the place appointed would oper-

68; *Hopgood v. Shaw*, 105 Mass. 276; *Goodwin v. Holbrook*, 4 Wend. 377. See, also, *ante* § 94.

<sup>1</sup> *Southwestern Freight Co. v. Plant*, 45 Mo. 517; *Talmage v. White*, 35 N. Y. S. C. 219; *Kelley v. Upton*, 5 Duer, 326. Part payment does not have the effect of paying the title. *Pierson v. Hoag*, 47 Barb. 243. But it has been held that it is a question of fact, depending upon the intentions of the parties, whether a sale for cash means a conditional sale, with a reservation of the title in the vendor until the price is paid.

<sup>2</sup> *Warder v. Hoover*, 51 Iowa, 491. See *ante*, § 85. See, also, *Dudley v. Sawyer*, 41 N. H. 326. It seems, however, that the goods themselves must be delivered, in order that the delivery may operate as a waiver of the condition of prepayment. A transfer of the bill of lading for the goods will not have the effect of passing the title to the vendee, in the case of a cash sale, at least so far as the vendee is himself concerned. *Evansville, &c., R. R. Co. v. Erwin*, 84 Ind. 457.

<sup>3</sup> *Refining Co. v. Miller*, 7 Phila. 97; *Harding v. Meltz*, 1 Tenn. Ch. 610. And where goods are sold for cash, under a custom of trade that "cash" means payment in ten days, it has been held that the sale is conditional and the title does not pass until payment of the price. *Dows v. Dennistown*, 28 Barb. 393.

ate as the breach of a condition precedent, which would relieve the other party from all obligation to accept some other performance of the contract. But whether such a stipulation is to be treated as a condition precedent or as a collateral covenant or agreement, the breach of which simply gives to the other party an action for damages, depends upon the intention of the parties. The stipulation is not held to be a condition, unless it is shown to have been fairly understood by the parties to be an essential element in the performance of the contract;<sup>1</sup> and the courts lean, in the absence of positive proof to the contrary, to the opinion that the stipulation as to time and place of performance is not a condition; and its breach, therefore, does not justify the refusal of a performance at a later time or in a different place, but simply gives to the other party his action for damages for the breach of the stipulation.<sup>2</sup>

§ 209. **Successive deliveries — Deliveries in installments.** — The contract of sale very frequently provides for

<sup>1</sup> 2 Schouler on Personal Property, § 239; *Thompson v. Ray*, 46 Ala. 224; *Norrington v. Wright*, 115 U. S. 188; *Bollman v. Burt*, 61 Md. 415; *Curtis v. Gibney*, 59 Md. 131; *Catlin v. Tobias*, 26 N. Y. 217; *Smith v. Brady*, 17 N. Y. 173; *Welsh v. Gossler*, 89 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216; *Pope v. Porter*, 102 N. Y. 366; *Rouse v. Lewis*, 2 Keyes, 352; *Slater v. Emerson*, 19 How. 224; *Jones v. United States*, 96 U. S. 24; *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255. In *Woodward v. Burton*, 115 Mass. 81, the principle was applied to a contract for the sale of a house, with the understanding that it was to be removed from the land within the stipulated time, and the court held the agreement to be a condition precedent, and that the right to the house was forfeited by a failure to remove it within the stipulated time. See, also, *Holton v. Goodrich*, 35 Vt. 19. But see, *contra*, *Davis v. Emery*, 61 Me. 140, where the breach of the stipulation as to time of removal was held to give to the seller only his action for damages.

<sup>2</sup> *Jonassohn v. Young*, 4 Best & Smith, 296; *Simpson v. Crippen*, L. R. 8 Q. B. 14; *Rogers v. Woodruff*, 23 Ohio St. 632; *Houck v. Miller*, L. R. 7 Q. B. D. 92; *Blackburn v. Reilly*, 47 N. J. L. 290; *Pope v. Porter*, 102 N. Y. 366; *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213. See, also, to same effect, as to place of performance, *Neill v. Whitworth*, L. R. 1 C. P. 684; 18 C. B. (N. S.) 485; 34 L. J. C. P. 155.

delivery of the goods in installments in stated quantities and at stated times, until the entire contract has been performed; and the question is raised, whether the failure to deliver one of these installments in full accordance with the terms will work such a complete forfeiture of the contract as that the buyer cannot thereafter be required to accept any more goods from the seller under the contract. It seems to be less difficult to accede the right of absolute forfeiture, where one of the installments of goods does not conform in quality or kind to the terms of the contract; and it seems to be settled such a breach of the terms of the contract would invariably defeat the right to a further performance of the contract.<sup>1</sup> But whether a failure to deliver one of these installments at the time agreed upon would operate as a breach of a condition to the whole contract seems rather to depend upon the intention of the parties. If the consequences of delay in delivery are serious, on account of the rapid decline in prices, or otherwise, the courts are inclined to hold the stipulation to be a condition, the breach of which, in the case of any one of the installments, would work a forfeiture of the whole contract.<sup>2</sup> And where the right of forfeiture is recognized and exercised for failure to make the delivery of an installment of goods according to the terms of the contract, it is held that the seller has not the right to recover the value or price of the installments, which had been previously delivered, on the ground that there is but one contract to pay the whole price for the full performance of the entire contract; and that if the contract is broken in part, and forfeited on

<sup>1</sup> *King Phillip's Mills v. Slater*, 12 R. I. 82.

<sup>2</sup> *Norrington v. Wright*, 115 U. S. 188; *Cleveland Rolling Mills v. Rhodes*, 121 U. S. 255; *Slater v. Emerson*, 19 How. 224; *Jones v. United States*, 96 U. S. 24; *Pope v. Porter*, 102 N. Y. 366; *Welsh v. Gossler*, 89 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216; *Elting Woolen Co. v. Martin*, 5 Daly, 417; *Catlin v. Tobias*, 28 N. Y. 217; *Smith v. Brady*, 17 N. Y. 173; *Bollman v. Burt*, 61 Md. 415; *Curtis v. Gibney*, 59 Md. 131.

that account, there is no privity of contract to support the claim for the price of the part of goods, which had been delivered.<sup>1</sup> This is not, however, a general rule, although it is in strict conformity with the common law doctrine of entirety of the contract.<sup>2</sup> Mr. Bishop introduces the moral element of perseverance or willfulness into the discussion of the right of recovering for the value of one's part performance, before the breach and the rescission of the contract for the breach of a part,<sup>3</sup> holding that if the breach is a consequence of the perverse or willful refusal to complete the performance of the contract, the party is not entitled to any equitable relief, and hence he should not be entitled to a recovery of the value of his part performance of the contract.<sup>4</sup> But if the subsequent partial failure of performance is the result of some mistake or unavoidable accident, the principles of equity would recognize the party's right to recover for his part performance, notwithstanding his subsequent breach of performance, and consequent rescission of the contract.<sup>5</sup>

<sup>1</sup> *Catlin v. Tobias*, 26 N. Y. 217; *Smith v. Brady*, 17 N. Y. 178.

<sup>2</sup> See, generally, *Cardell v. Bridge*, 9 Allen, 355; *Harrison v. Sale*, 6 Sm. & M. 634; *Britton v. Turner*, 6 N. H. 481; *Carroll v. Welch*, 26 Tex. 147; *Patrick v. Putnam*, 27 Vt. 759; *Veazie v. Hosmer*, 11 Gray, 396; *Byerlee v. Mendel*, 89 Iowa, 382; *Wade v. Haycock*, 1 Casey (Pa.), 382; *Lomax v. Bailey*, 7 Blackf. 599; *Goodwin v. Merrill*, 13 Wis. 658; *Hartwell v. Jewett*, 9 N. H. 249; *Cahill v. Patterson*, 30 Vt. 592; *Pixler v. Nichols*, 8 Iowa, 106; *Downey v. Burke*, 23 Mo. 228; *Clayton v. Blake*, 4 Ired. 497; *Bee Printing Co. v. Hichborn*, 4 Allen, 63.

<sup>3</sup> See *Bishop's Contracts*, §§ 1444, 1445.

<sup>4</sup> Citing *Wooley v. Staley*, 39 Ohio St. 854; *Brewster v. Burnett*, 125 Mass. 68; *Lane v. Hogan*, 5 Yerg. 290; *Mayer v. New York*, 63 N. Y. 455; *Devine v. Edwards*, 87 Ill. 177; *Bishop v. Brown*, 51 Vt. 330; *Dermott v. Jones*, 2 Wall. 1; *Dula v. Cowles*, 2 Jones (N. C.) 454; *Lewis v. Esther*, 2 Cranch, C. C. 428; *Brown v. Kimball*, 12 Vt. 617; *Malbon v. Birney*, 11 Wis. 107; *Bayard v. McLane*, 3 Harr. 139; *Martin v. Schoenberger*, 8 Watts & S. 367; *Niblett v. Herring*, 4 Jones (N. C.) 262.

<sup>5</sup> Mr. Bishop cites the following cases in support of this proposition: *Ladue v. Seymour*, 26 Wend. 60; *Dermott v. Jones*, 2 Wall. 1; *Hollinsead v. Mactier*, 13 Wend. 275; *Stewart v. Craig*, 3 Greene (Iowa), 505;



There are, however, some respectable authorities, which incline to hold that the failure to make a delivery of one of the installments of goods does not justify the rescission of the entire contract of sale; in other words, the stipulation is not a condition, but a contract, the breach of which in any part simply gives to the party aggrieved his action for damages, but not the right to rescind the contract, and refuse to accept subsequent deliveries in conformity with the terms of the contract.<sup>1</sup> But the right to rescind, on account of a partial failure of delivery, will be waived or condoned, if the buyer should accept any benefits under the contract, or delay the exercise of his right to rescind for an unreasonable length of time, after the breach of the condition.<sup>2</sup>

§ 210. **Successive payments** — Sales with installments of payments. — In determining the effect of a failure to make payment of one of the installments of the price, in a contract which provides for the payment of the price in installments at stated times and in stated amounts, a somewhat different test must be applied, in order that the authorities may be understood and may be reconciled to each other. Although there are a few cases, which the test will not satisfy, the great bulk of the cases may be explained as follows. If the breach of condition of part payment is the

*Thompson v. Purcell*, 10 Allen, 426; *Bassett v. Sanborn*, 9 Cush. 58; *Pratt v. Law*, 9 Cranch, 456; *Lee v. Ashbrook*, 14 Mo. 378; *Lomax v. Bailey*, 7 Blachf. 599; *Hargrave v. Conroy*, 4 C. E. Greene, 281; *Wade v. Haycock*, 1 Casey (Pa.) 382; *Tunno v. Robert*, 16 Fla. 138; *Preston v. Finney*, 2 Watts & S. 53; *Allen v. Mills*, 4 La. An. 97; *Drafer v. Randolph*, 4 Harr. 454; *Hall v. Cannon*, 4 Harr. 360; *Thomas v. Ellis*, 4 Ala. 108; *Hayward v. Leonard*, 7 Pick. 181; *Arthur v. Saunders*, 9 Port. 626; *Whipple v. Dow*, 2 Mass. 415; *Merrill v. Ithaca, &c., R. R. Co.*, 16 Wend. 586; *Dermott v. Jones*, 23 How. 220.

<sup>1</sup> See, to that effect, *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; 30 Am. Law Reg. 398, note; *Blackburn v. Reilly*, 47 N. J. L. 290; *Morgan v. McKee*, 77 Pa. St. 228; *Scott v. Kittaning Coal Co.*, 89 Pa. St. 237.

<sup>2</sup> *Maryland Fertilizing Co. v. Lorentz*, 44 Md. 218; *Morgan v. McKee*, 77 Pa. St. 228; *Scott v. Kittaning Coal Co.*, 89 Pa. St. 237.

result of some accident or oversight, or is attendant by other facts and circumstances which are inconsistent with an intention to abandon the contract, and which incline one to presume that the buyer intended to fully perform the contract, then the failure to pay an installment at the agreed time does not work a forfeiture of the whole contract, but by tender of the future installments of payments he may claim the benefits of the sale.<sup>1</sup> But if the acts of the buyer, in failing to make the payment of an installment, indicate his intention to abandon the contract, as where the refusal to pay is willful, and not through a misunderstanding or accident, the entire contract is held to be forfeited, and the seller cannot thereafter be compelled to perform the contract.<sup>2</sup> A refusal to pay, because of one's pecuniary inability, if it is more or less continued, would be presumed to show an intention to abandon the further performance of the contract.<sup>3</sup> And the presumption of an intention to abandon the contract would become conclusive, if the failure to pay an installment of the price was accompanied by a refusal to receive and accept any more goods.<sup>4</sup>

Where the contract provides for the payment of the price in installments, the title ordinarily, *i.e.*, in the absence of an express agreement to the contrary, does not vest in the purchaser, until the price has been paid in full or the property is delivered; <sup>5</sup> and the parties may provide

<sup>1</sup> *Mersey Steel Co. v. Naylor*, 9 App. Cas. 484; *Midland Railway Co. v. Ontario Rolling Mills*, 10 Ont. App. 677; *Hime v. Klasey*, 9 Bradw. 166; *Winchester v. Newton*, 2 Allen, 492; *Gill v. Benjamin*, 64 Wis. 362.

<sup>2</sup> *Stephenson v. Cady*, 117 Mass. 6; *Curtis v. Gibney*, 59 Md. 181; *Bradley v. King*, 44 Ill. 339; *Regg v. Moore*, 110 Pa. St. .

<sup>3</sup> *Stewart v. Many*, 7 Bradw. 508; *Branch v. Palmer*, 65 Ga. 210; *Dwinel v. Howard*, 30 Me. 258; *Robson v. Bohn*, 27 Minn. 333; *Landeche v. Sarpy*, 37 La. An. 835; *Reybold v. Voorhees*, 30 Pa. St. 116.

<sup>4</sup> *Fletcher v. Cole*, 23 Vt. 114; *Haines v. Tucker*, 50 N. H. 309.

<sup>5</sup> *Forsyth v. Dickson*, 1 Grant (Pa.), 26; *Andrews v. Durant*, 11 N. Y. 35; *Williams v. Jackman*, 16 Gray, 514; *Green v. Hall*, 1 Houst. 506; *Mixer v. Howarth*, 21 Pick. 205; *Edwards v. Elliott*, 36 N. J. L. 449. See

that the title shall remain in the vendor, until a full payment of the price, notwithstanding the possession of the goods is given to the purchaser.<sup>1</sup> If the purchaser pays one or more of the installments, and then makes default in the subsequent payments, the consequent forfeiture of the contract would also involve a forfeiture of the installments of the price already paid, and the purchaser would be denied the right to recover them.<sup>2</sup> But while this is the general rule, it is now provided by statute in some of the States<sup>3</sup> and held by many of the courts possessing equity powers,<sup>4</sup> that the vendor is not permitted to retain more of the installments already paid than what is necessary to compensate him for the damage done to the goods, and for the use of the goods.<sup>5</sup> As in the case of successive deliveries, the

*Wood v. Russell*, 5 B. & Ad. 942; *Clarke v. Spence*, 4 Ad. & E. 448. See *ante*, §

<sup>1</sup> *Hine v. Roberts*, 48 Conn. 268; *Knittel v. Cushing*, 57 Tex. 354; *Sumner v. Cotley*, 71 Mo. 121; *Hervey v. Locomotive Works*, 98 U. S. 664; *Singer Mfg. Co. v. Graham*, 8 Oreg. 17; *Lucas v. Campbell*, 88 Ill. 447; *Singer Mfg. Co. v. Cole*, 4 Lea, 439; *Sage v. Sleutz*, 28 Ohio St. 1; *Cole v. Munn*, 3 Thomp. & C. 380; *Giddey v. Altman*, 27 Mich. 206; *Goldsmith v. Bryant*, 26 Wis. 34; *Preston v. Whitney*, 28 Mich. 260; *Sutton v. Campbell*, 2 Thomp. & C. 595.

<sup>2</sup> *Angier v. Taunton Paper Co.*, 1 Gray, 621; *Colcord v. McDonald*, 128 Mass. 470; *Everett v. Hall*, 67 Me. 497; *Duke v. Shackelford*, 56 Miss. 552; *Latham v. Sumner*, 89 Ill. 233; *Fleck v. Warner*, 25 Kan. 492; *Whelan v. Couch*, 26 Grant (Ont.), 74; *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57; *Howe Machine Co. v. Willie*, 85 Ill. 333; *Haviland v. Johnson*, 7 Daly, 297; *Brown v. Haynes*, 52 Me. 578; *Knox v. Perkins*, 15 Gray, 529; *Sere v. McGovern*, 65 Cal. 244. But see *Cushman v. Jewell*, 14 N. Y. S. C. 525, where it is held that the vendor must give the purchaser notice of the proposed forfeiture before the purchaser will lose his claim to the money already paid.

<sup>3</sup> Ohio, Act of 1835, p. 239, § 2; Rev. Stat. Mo. (1879), § 2508.

<sup>4</sup> *Preston v. Whitney*, 28 Mich. 260; *Hine v. Roberts*, 48 Conn. 267; *Minneapolis, &c., Co. v. Hally*, 27 Minn. 495; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Gleason v. Knapp*, 26 Up. Can. C. P. 553; *Ketchum v. Brennan*, 53 Miss. 596; *Gullford v. McKinley*, 61 Ga. 230; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Johnson v. Whittemore*, 27 Mich. 463. 470.

<sup>5</sup> The statutes of Missouri and Ohio provide that a certain percentage may be retained as compensation for the use of the goods.

receipt of payment after default in payment of one of the installments will operate as a waiver of the right of forfeiture for the default; and the purchaser can claim the property on tendering the full amount of the price.<sup>1</sup>

§ 211. Notice as a condition precedent. — If the sale is made to depend upon the happening of some contingent event, the ordinary rule is that the seller must ascertain at his own peril when the event happens, and tender delivery promptly if he wants to hold the buyer to his contract. The buyer is ordinarily not required to give the seller notice of the occurrence of the contingency.<sup>2</sup> But the giving of the notice by the buyer may be made the condition precedent to the performance of the contract by the seller, so that the seller is not required to deliver the goods, until the buyer notifies him of the occurrence of the contingency. This is not only the case where the parties expressly provide that the buyer shall notify the seller,<sup>3</sup> but the buyer's obligation to give notice may be implied from the fact that the occurrence of the contingent event is not equally within the knowledge of both parties. If the fact or contingency is peculiarly within the knowledge of the buyer, and it is not equally accessible to the seller, it is presumed that the parties intended that the buyer should give notice of its occurrence, before he could require the seller to perform the contract.<sup>4</sup>

<sup>1</sup> *Hutchings v. Munger*, 41 N. Y. 155; *Taylor v. Finley*, 48 Vt. 78; *Shepard v. Cross*, 38 Mich. 96; *Blair v. Hamilton*, 48 Ind. 82; *Cushman v. Jewell*, 7 Hun, 525. But see, *contra*, *Hegler v. Eddy*, 53 Cal. 597.

<sup>2</sup> See *Vyse v. Wakefield*, 6 M. & W. 442; *Watson v. Walker*. 23 N. H. 491; 2 *Schouler Personal Prop.*, § 291.

<sup>3</sup> See *Baker v. Mair*, 12 Mass. 121; *Eames v. Savage*, 14 Mass. 425; *Newcomb v. Brackett*, 16 Mass. 161; *Watson v. Garren*, 6 Up. Can. Q. B. 542; *Topping v. Root*, 5 Cow. 404; *Sanborn v. Benedict*, 78 Ill. 309. The same thing occurs where an option to buy or reject is given to the buyer. *Kirkpatrick v. Alexander*, 44 Ind. 595.

<sup>4</sup> *Haule v. Heming*, 6 M. & W. 654; *Vyse v. Wakefield*, 6 M. & W. 442;

It is also the rule, that if the contract calls for the delivery of certain goods from time to time without any limit being expressly provided, it is presumed that the seller is authorized to supply these goods from time to time, until he is notified by the buyer to discontinue the delivery of them.<sup>1</sup>

§ 212. **Sales dependent upon the acts of others.** — Very often the validity of the sale is made to depend upon the judgment of some third person as to its quality or fitness for some particular use. Until the judgment is pronounced, and communicated in some form, usually in the form of a certificate of inspection, the buyer is not bound by his contract, and cannot be compelled to receive the goods, or pay the price. This is frequently the case in the sale of provisions, where the buyer is permitted by law to require an inspection of the goods by a public official, before he is bound to receive and pay for the goods.<sup>2</sup> In the absence of fraud, the decision of the third person, to whose judgment the validity of the sale is referred, is final and binding on the parties, whether the judge be a private individual or a public official.<sup>3</sup>

*Quarles v. George*, 23 Pick. 400; *Tasker v. Bartlett*, 5 Cush. 364; *Clough v. Hoffman*, 5 Wend. 500; *Watson v. Walker*, 23 N. H. 471; *Haines v. Tucker*, 50 N. H. 307.

<sup>1</sup> *Houston, &c., R. R. Co. v. Mitchell*, 38 Tex. 85; 2 Schouler on Personal Prop., § 291a.

<sup>2</sup> *Gunther v. Atwell*, 19 Md. 158; *Heilbütt v. Hickson*, L. R. 7 C. P. 438; *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422. The validity of fire insurances policies is often made dependent upon the procurement of a certificate from some justice of the peace, the life insurance policy on the physician's certificate of examination, and the building contract on the architect's certificate of compliance by the contractor with the specifications. See *Smith v. Briggs*, 3 Denio, 73; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49; *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. L. 110; *Noonan v. Hartford Ins. Co.*, 21 Mo. 81; *Scott v. Phoenix Ins. Co.*, *Stuart (Can.)*, 354; *Inman v. Western Ins. Co.*, 12 Wend. 452; *Protection Ins. Co. v. McPherson*, 5 Ind. 417; *Leadbetter v. Ætna Ins. Co.*, 13 Me. 265; *Kirtland v. Moore*, 40 N. J. Eq. 106.

<sup>3</sup> *Robbins v. Clark*, 129 Mass. 145; *Flint v. Gibson*, 106 Mass. 391; *Norfsinger v. Ring*, 71 Mo. 149.

§ 213. **Sales on trial — Sale or return — What constitutes a satisfactory sale.** — Frequently goods are put into the possession of the person who is proposing to buy them, with the understanding that they can try the goods and if they prove unsatisfactory, they may be returned, and the price recovered if it has been paid. But the transaction may assume one of two forms. If the understanding of the parties is that the title shall remain in the vendor until the goods have proven by the trial to be satisfactory and the buyer has decided to keep them, this is called a sale on trial, which constitutes a species of bailment, until the decision to buy the goods is made, when the transaction becomes a sale.

The title being during the trial in the vendor, any loss or damage suffered by the property from any other cause than the negligence of the prospective buyer, will fall on the vendor.<sup>1</sup>

If, on the other hand, the understanding of the parties is that the title to the goods shall pass immediately to the buyer, subject to the condition subsequent that, if the goods do not prove satisfactory, he may return them, then the transaction is called a sale or return, and any damage to the property so sold will fall on the purchaser, whatever may be the cause of it, and he will be precluded from relieving himself of liability for the price by a return of the goods. He can be compelled to pay the price, although he had not completed his trial and examination of the goods.<sup>2</sup>

<sup>1</sup> *Hunt v. Wyman*, 100 Mass. 198; *Pitt's Son's Mfg. Co. v. Poor*, 7 Bradw. 24; *Fairfield v. Madison Mfg. Co.*, 88 Wis. 846; *Spickler v. Marsh*, 86 Md. 222; *Aultman v. Thehrer*, 84 Iowa, 272; *Kahn v. Klabunde*, 50 Wis. 235; *Prairie Farm Co. v. Taylor*, 69 Ill. 440; *Dewey v. Erie*, 14 Pa. St. 211; *Waters Heating Co. v. Mansfield*, 48 Vt. 378; *Mowbray v. Cady*, 40 Iowa, 604; *Hickman v. Shimp*, 109 Pa. St. 16.

<sup>2</sup> *Dearborn v. Turner*, 16 Me. 17; *Buswell v. Bicknell*, 17 Me. 344; *Southwick v. Smith*, 29 Mo. 228; *Crocker v. Gullifer*, 44 Me. 491; *Martin v. Adams*, 104 Mass. 262; *Stevens v. Cunningham*, 8 Allen, 491; *Walker v. Blake*, 37 Me. 373; *Perkins v. Douglas*, 20 Me. 317; *McKinney v. Brad-*

But whether the transaction be a "sale on trial" or "a sale or return," — a sale upon condition precedent, or a sale upon condition subsequent — the decision not to take or keep the goods must be made and communicated to the seller within the time agreed upon, if the time has been fixed by the contract, and if not, then in a reasonable time. If the seller is not notified or the goods not returned within the required time, the sale becomes absolute, and the buyer becomes liable for the price.<sup>1</sup> Where the contract does not fix the time, as already stated, the option must be exercised within a reasonable time.<sup>2</sup> And the question, what is a reasonable time, is one of fact for the jury, to be determined under all the circumstances of the particular case.<sup>3</sup>

lee, 117 Mass. 321; *Moss v. Sweet*, 3 Eng. L. & E. 311; *Hotchkiss v. Higgins*, 52 Conn. 205; *Jameson v. Gregory*, 4 Met. (Ky.) 863; *Manny v. Glendinning*, 15 Wis. 50; *Carter v. Wallace*, 32 Hun, 384.

<sup>1</sup> Sale on trial. *Waters Heater Co. v. Mansfield*, 48 Vt. 378; *Dewey v. Erie*, 14 Pa. St. 211; *Prairie Farm Co. v. Taylor*, 69 Ill. 440; *Kahn v. Klabunde*, 50 Wis. 235; *Smalley v. Hendrickson*, 29 N. J. L. 371; *Aiken v. Hyde*, 99 Mass. 183; *Gibson v. Vail*, 53 Vt. 476; *Aultman v. Theiler*, 34 Iowa, 272; *Spickler v. Marsh*, 36 Md. 222; *Fairfield v. Madison Mfg. Co.*, 88 Wis. 346; *Elphick v. Barnes*, L. R. 5 C. P. D. 326; *Mowpray v. Cady*, 40 Iowa, 604; *Colton v. Wise*, 7 Ill. App. 395; *Hickman v. Shimp*, 109 Pa. St. 16; *Johnson v. McLane*, 7 Blackf. 501; *Dewey v. Erie Borough*, 14 Pa. St. 211; *Hall v. Merriwether*, 19 Tex. 224; *Humphries v. Carvalho*, 16 East, 45; *Delamater v. Chappell*, 48 Md. 244; *McCormick v. Basal*, 50 Iowa, 523. Sales or return, where the goods ordinarily have to be returned, if the buyer decides to reject them. *Schlesinger v. Stratton*, 9 R. I. 578; *Moss v. Sweet*, 3 Eng. L. & Eq. 311; *Quinn v. Stout*, 31 Mo. 160; *Beverly v. Lincoln Gas, &c., Co.*, 6 Ad. & E. 828; *Bianchi v. Nash*, 1 M. & W. 545; *Washington v. Johnson*, 7 Humph. 468; *Hotchkiss v. Higgins*, 52 Conn. 205; *Jameson v. Gregory*, 4 Met. (Ky.) 863; *Moore v. Piercy*, 1 Jones (N. C.), 131; *Ray v. Thompson*, 12 Cush. 287; *Jones v. Wright*, 71 Ill. 61. The buyer has the entire time in which to make his decision, and he may fluctuate as much as he pleases during that time as long as he does not communicate his decision to the seller. *Reese v. Beck*, 24 Ala. 651; *Ellis v. Mortimer*, 1 Bos. & P. N. R. 257; *Aiken v. Hyde*, 99 Mass. 183; *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

<sup>2</sup> *Hickman v. Shimp*, 109 Pa. St. 16; *Quinn v. Stout*, 31 Mo. 160; *Spickler v. Marsh*, 36 Md. 222; *Washington v. Johnson*, 7 Humph. 468.

<sup>3</sup> *Washington v. Johnson*, 7 Humph. 468. Fifteen years was held to

Whether the goods are to be returned to the seller, or a simple notice of rejection sent to him, in order to terminate the transaction, will vary with the terms of the agreement, and with the understanding of the parties.<sup>1</sup> But, in the absence of express proof of the intentions of the parties, the presumption is that notice is sufficient in the case of "sales on trial;" but that the return of the goods is necessary in the "sales on return."<sup>2</sup> But if, in a case where a return of the goods is required, the seller refuses to receive the goods, the buyer is fully protected from liability for the price and for the goods, if he notifies the seller where the goods can be found.<sup>3</sup>

The right of rejection of the goods will also be lost, and the sale become absolute, if the buyer so damages the goods, while they are in his possession, that their value has been materially impaired.<sup>4</sup> And where the trial of the property involves a consumption of a part of it; the buyer is only justified in consuming what is necessary to the trial of the goods, and if he consumes more than what is necessary, the sale will become absolute, and the buyer will be liable for the price.<sup>5</sup>

If the condition of the sale be that the property may be returned, if it did not prove satisfactory to the buyer, or if the buyer was not satisfied with it after trial, the condition must be fully performed, *i.e.*, the buyer must in fact be satisfied with it. If the buyer expresses himself to be dis-

be an unreasonable delay in *Cooper v. Carlisle*, 2 Green (N. J.), 525; and the time was held to be reasonable in *Hall v. Meriwether*, 19 Tex. 224, where a cotton gin was kept from spring until October.

<sup>1</sup> *Gammon v. Abrams*, 53 Wis. 323; *Hinchliffe v. Barwick*, L. R. 5 Ex. D. 177.

<sup>2</sup> See cases in preceding note.

<sup>3</sup> *Hall v. Aetna Mfg. Co.*, 30 Iowa, 215; *Padden v. Marsh*, 34 Iowa, 522.

<sup>4</sup> *Ray v. Thompson*, 12 Cush. 281; 20 Am. Law Reg. (N. S.) 245, note.

<sup>5</sup> See *Elliott v. Thomas*, 3 M. & W. 170; *Okell v. Smith*, 1 Stark. 107; *Lucy v. Moufflet*, 5 Hurl. & N. 229.



satisfied, it matters not how unreasonable or groundless his dissatisfaction may be, he cannot be required to keep the property. The buyer is not obliged to be satisfied, although the property delivered conformed to his order.<sup>1</sup> But some of the cases require that the dissatisfaction must be real, in order to relieve the buyer from liability, although they recognize that the dissatisfaction may be unreasonable without affecting the right of rejection.<sup>2</sup> Some of the courts also maintain that if the thing purchased on condition of proving satisfactory is to be attached to a building or to real estate in general, and a return of it will not place the seller *in statu quo*, the buyer should be required to prove that his objections to the thing were reasonable.<sup>3</sup> But other parallel cases do not support this distinction.<sup>4</sup>

§ 214. Sale of goods to arrive.— Very often merchants are desirous of making a sale of goods, which they have bought but which they have not yet received; and so they make the sale with the understanding that they are yet to arrive. The sale may assume one of three forms: 1. It may be an immediate sale and transfer of title of the

<sup>1</sup> *Brown v. Foster*, 113 Mass. 136; *Baleski v. Clark*, 44 Conn. 218; *Hoffman v. Gallagher*, 6 Daly, 42; *Goodrich v. Van Nortwick*, 43 Ill. 445; *Hartman v. Blackburn*, 7 Pitt. Leg. Journal, 140; *Sulisbury Mfg. Co. v. Chico*, 24 Fed. Rep. 898; *Wood Reaping Machine Co. v. Smith*, 50 Mich. 565; *McClure v. Briggs*, 58 Vt. 82; *Pierce v. Cooley*, 56 Mich. 552; *Hallidie v. Sutter St. R. R. Co.*, 63 Cal. 575; *Exhaust Ventilator Co. v. Chicago R. R. Co.*, 66 Wis. 218; *McCormick Machine Co. v. Chesrown*, 33 Minn. 32; *Gray v. Central R. R. Co.*, 11 Hun, 70; *Gibson v. Cravage*, 39 Mich. 49; *McCarren v. McNulty*, 7 Gray, 139; *Heron v. Davis*, 8 Bosw. 336; *Grant v. Burch*, 26 Hun, 376.

<sup>2</sup> *McClure v. Briggs*, 58 Vt. 82; *Hartford Mfg. Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *Manny v. Glendinning*, 15 Wis. 50; *Sillsby Mfg. Co. v. Chico*, 24 Fed. Rep. 898.

<sup>3</sup> *Walker v. Orange*, 16 Gray, 193; *Atkins v. Barnstable*, 97 Mass. 428; *Duplex v. Safety Co. v. Garden*, 101 N. Y. 387.

<sup>4</sup> *Singerly v. Thayer*, 108 Pa. St. 291; 34 Am. Law. Reg. 18, note. But see, also, *Veazle v. Bangor*, 53 Me. 50; *Bucksport R. R. Co. v. Brewer*, 67 Me. 295.

goods, while in transit, in which case the purchaser is liable for the price, whether the goods arrive or not; for the loss in transit, but after the sale, would fall upon the purchasers, since the title to the goods was already in him.<sup>1</sup> 2. It may be an executory sale, to become executed upon the arrival of the goods, but upon their failure to arrive, neither party is bound by the contract of sale, or liable on it for the failure of performance, since the arrival of the goods was the condition precedent to the liability of both vendor and vendee. 3. It may be an executory sale, to be executed on the arrival of the goods, coupled with a warranty on the part of the vendor that the goods shall arrive and be delivered in accordance with the terms of the contract. The question, which of these three forms the contract for the sale of goods in transit shall take, is one of fact, the answer to which depends upon the intentions of the parties, as manifested by and in the express terms of the contract.

In the first place, the presumption of law is generally against the contract being an executed sale. The contract is presumed to be executory and conditional upon the arrival of the goods.<sup>2</sup> So also is the contract presumed to be executory and conditional, if the sale was of goods at sea, "to be paid for on delivery."<sup>3</sup> But if the bill of lading for goods was assigned by indorsement and delivery to the purchaser, and the terms of the sale had been fixed, as well as when there has been any other kind of assignment of the goods by means of a written bill of sale, or order, the contract will be held to be an immediate sale of the goods, and transfer of title.<sup>4</sup> But inasmuch as this is

<sup>1</sup> See *ante*, §§ 104, 105.

<sup>2</sup> *Shields v. Pettie*, 2 Sandf. 262; 4 N. Y. 122; *Benedict v. Field*, 4 Duer, 154; 16 N. Y. 595; *Russell v. Nichols*, 3 Wend. 112; *Lovatt v. Hamilton*, 5 M. & W. 639; *Stockdale v. Dunlop*, 6 M. & W. 224; *Johnson v. McDonald*, 9 M. & W. 600; *Neldon v. Smith*, 7 Vroom, 148, 154.

<sup>3</sup> *Shields v. Pettie*, 2 Sandf. 262; 4 N. Y. 122.

<sup>4</sup> *Alexander v. Gardner*, 1 Bing. N. C. 671; 1 Scott, 630; 1 Hodges,

a question of intention, even such facts as these just mentioned and their dependent presumption may be controlled by an express statement of the intention of the parties to the contrary.

It is also the presumption of the law, where a sale is made of goods to arrive, that the parties intended that the arrival of the goods, of the quality and quantity described in the contract, should be a condition precedent to the assumption of any obligation by either party; and if the goods called for under the contract, did not arrive, neither party was bound or liable on the contract, since the breach of the condition avoided the contract entirely. There is no warranty in such a contract that the goods shall arrive.<sup>1</sup> And the same construction is placed upon the contract, whether the sale was of goods "on arrival" or "to arrive," the form of the contract being ordinarily immaterial.<sup>2</sup> But the parties may, expressly or by necessary implication, provide that the vendor shall warrant the arrival of the goods and if such an intention is shown in any case, the vendor is liable on his warranty, if the goods fail to arrive in accordance with the terms of the contract.<sup>3</sup> But while the presumption is against the creation of a warranty that the goods shall arrive in a sale of goods "on arrival,"<sup>4</sup> and also where there is a statement in the con-

147; *Stubbs v. Lund*, 7 Mass. 453; *Jordan v. James*, 5 Ham. (Ohio) 89; *Gardner v. Howland*, 2 Pick. 599; *Pratt v. Parkman*, 24 Pick. 42; *Lanfear v. Summer*, 17 Mass. 110; *Howland v. Harris*, 4 Mason, 497; *Lee v. Kimball*, 45 Me. 172; *Walter v. Ross*, 2 Wash. C. C. 283; *Caldwell v. Ball*, 1 T. R. 205.

<sup>1</sup> *Shields v. Pettie*, 2 Sandf. 262; 4 N. Y. 122; *Neldon v. Smith*, 36 N. J. L. 154; *Johnson v. McDonald*, 9 M. & W. 600; *Hawes v. Lawrence*, 4 Comst. 345; *Boyd v. Siffkin*, 2 Camp. 326; *Russell v. Nichols*, 3 Wend. 112; *Benedict v. Field*, 16 N. Y. 595; *Lovatt v. Hamilton*, 5 M. & W. 639; *Stockdale v. Dunlop*, 6 M. & W. 224.

<sup>2</sup> *Johnson v. McDonald*, 9 M. & W. 600; *Rogers v. Woodruff*, 23 Ohio St. 632, an important case. See *Montgomery v. Middleton*, 13 Ir. C. L. 178.

<sup>3</sup> *Dike v. Reitlinger*, 23 Hun, 242.

<sup>4</sup> See *supra*.

tract that the goods will arrive on or before a certain date,<sup>1</sup> if the contract contains a statement that the goods "are now on their passage," it is presumed that the parties intended to warrant the truth of that representation, and that the condition referred only to the safe arrival of the goods. The vendor would therefore be liable on his covenant, if the vessel arrived and it was ascertained that the goods had never been on board.<sup>2</sup> It is also held to be a warranty, in a contract to take freight from another vessel in a foreign port, that the vessel, from which the cargo was to come, would be in the harbor awaiting a transfer of the cargo.<sup>3</sup> Where the representation was made that the vessel had sailed on a given date, it is held that it is presumed to be neither a warranty nor a condition, but a representation, the falsity of which does not impose any liability on the vendor, unless it amounted to a case of fraud or deceit.<sup>4</sup> Where the obligation to deliver the goods was absolute, instead of being conditional on the arrival of the goods, the vendor is not excused from the performance of his contract by the blockade of a port, or any other inevitable accident.<sup>5</sup>

Where one makes a conditional sale of goods "on arrival," the condition is not fully performed so as to bind either party, unless the vessel contains the goods in quality and quantity, as called for by the contract. The vendee is not obliged to receive, nor the vendor to deliver, goods of a different quality or quantity.<sup>6</sup> Where a sale is made of

<sup>1</sup> *Russell v. Nicoll*, 3 Wend. 112; *Alewyn v. Pryor*, R. & M. 406.

<sup>2</sup> *Gorrison v. Ferrin*, 2 C. B. (N. S.) 681.

<sup>3</sup> *Higginson v. Weld*, 14 Gray, 165; *Splidt v. Heath*, 2 Camp. 57; *Atkinson v. Ritchie*, 10 East, 530.

<sup>4</sup> *Hawes v. Lawrence*, 4 N. Y. 346; *Hawes v. Humble*, 2 Camp. 327.

<sup>5</sup> *Atkinson v. Ritchie*, 10 East, 530; *Hayward v. Scougall*, 2 Camp. 56; *De Medeiros v. Hill*, 5 C. & P. 182; *Spence v. Chadwick*, 10 A. & E. (N. S.) 517.

<sup>6</sup> *Vernede v. Weber*, 1 H. & N. 311; 38 Eng. L. & E. 277. But see *Simond v. Braddon*, 2 C. B. 324; 40 Eng. L. & Eq. 285, where there was

“ a cargo,” the entire cargo is meant, and the buyer is not required to accept less.<sup>1</sup> But when the carrying capacity of the vessel is mentioned, it is considered only as a representation not binding as a warranty or condition, and the condition is fully performed, if the vessel arrives with as large a cargo, as it could carry.<sup>2</sup> So, also, in order to bind either party, must the goods arrive within the stipulated time, if there be such a stipulation,<sup>3</sup> and be of a merchantable quality, independent of any express representations as to quality.<sup>4</sup> It is also a part of the condition that the goods shall arrive on the vessel described in the contract, and is not performed by the arrival of the goods on another vessel or on a different voyage of the same vessel.<sup>5</sup> So, also, must the vessel arrive with the goods at the agreed port of delivery. The condition is not performed by the arrival of the goods at some other port, whether the delivery of the goods at the other port was voluntary or through stress of circumstances.<sup>6</sup> The condition is not fully performed, if the vessel arrives without the goods.<sup>7</sup> But the contract is fully performed if the vessel arrives at the agreed port, with goods of the quality and quantity, called for by the contract of sale, although they are not consigned to the

an absolute obligation or warranty to deliver the goods in quality and quantity, as per contract.

<sup>1</sup> *Borrowman v. Drayton*, 2 Ex. Div. 15. See *Ireland v. Livingston*, L. R. 2 Q. B. 99; B. R. 5 Q. B. 516; L. R. 5 H. L. 395-410; *Flanagan v. Demarest*, 3 Roberts, 173.

<sup>2</sup> *Pembroke Iron Co. v. Parsons*, 5 Gray, 589.

<sup>3</sup> *Alewy v. Pryor*, R. & M. 406; *Russell v. Nicoll*, 3 Wend. 112.

<sup>4</sup> *Cleu v. McPherson*, 1 Bosw. 480; *Gorrisen v. Perrim*, 2 C. B. (N. S.) 681; *Wright v. Hart*, 17 Wend. 267; 18 Wend. 449; *Chanter v. Hopkins*, 4 M. & W. 399; *Hyatt v. Boyles*, 5 G. & J. 110; *Hargous v. Stone*, 1 Seld. 86. See *ante*, § 190.

<sup>5</sup> *Lovatt v. Hamilton*, 5 M. & W. 639; *Smith v. Meyers*, L. R. 5 Q. B. 429; L. R. 7 Q. B. 139. But a mere misnomer in the description of the vessel, will not affect the enforcement of the contract. *Smith v. Pettee*, 70 N. Y. 13.

<sup>6</sup> *Idle v. Thornton*, 3 Camp. 274.

<sup>7</sup> *Boyd v. Siffkin*, 2 Camp. 325.

vendor. Unless the parties expressly stipulate that they are consigned to him, the vendor will be bound by his contract on the arrival of the goods, notwithstanding the fact that he cannot buy any of the goods from the consignees.<sup>1</sup> But it must not be understood from this, that the vendor would be liable, if goods of the same description arrived by the same vessel, although they were not the goods which were expected. The cases cited refer to cases of consignments and the cargoes of chartered vessels, where the identical goods contracted for do arrive, but consigned to some one other than the vendor. The same principle cannot be applied to the miscellaneous cargoes of the great steamship common carriers of the ocean and navigable rivers.

§ 215. Correspondence of bulk with sample or description — Genuineness of commercial securities. — In the preceding chapter on warranty<sup>2</sup> it was explained what confusion prevails in the cases as to the effect of a sale by sample or by description, some of the authorities maintaining that the correspondence of the bulk with sample or description was a duty arising from an implied warranty of the vendor, while others held that there was no warranty but a condition usually precedent but sometimes subsequent,<sup>3</sup> the breach of which prevented the transfer of title to the purchaser, and the enforcement of the contract against him, if it was a condition precedent; and if it was a condition subsequent, it would work a forfeiture of the

<sup>1</sup> *Hibblewhite v. McMorine*, 5 M. & W. 462; *Fischel v. Scott*, 15 C. B. 69; *Gorrisen v. Perrin*, 2 C. B. (N. S.) 681. In *Fischel v. Scott*, the court say: "The oil is described pretty clearly; the question is, whether the oil which came was 'oil expected to arrive by the Resolute.'" *Maule, J.* "It is quite inconsistent with this plea that the oil contracted to be sold did not arrive by the Resolute. The oil which was expected did arrive. The defendants expected it to come consigned them; but it turned out that it was consigned to some one else." *Jervis, C. J.*

<sup>2</sup> See *ante*, § 197.

<sup>3</sup> See *ante*, § 117, on the effect of acceptance.

vendee's title. Inasmuch as all of the cases agree that the want of correspondence of the bulk with sample or description operated to defeat or prevent the vesting of the title to the goods, as well as to give to the vendee at his option an action for damages, the conclusion was reached that the implied provision for correspondence of bulk with sample or description operated both as a condition and a warranty.<sup>1</sup> It will not be necessary to add anything here to the discussion given elsewhere, and it will suffice to refer here to the cases, in which this provision has been held to operate as a condition.<sup>2</sup>

The same confusion prevails in the attempt to determine whether the sale of a counterfeit commercial paper was the breach of a condition or of a warranty, some of the cases maintaining that the genuineness of such paper was a condition,<sup>3</sup> while others hold the sale of counterfeit securities to be the breach of a warranty.<sup>4</sup> But the true rule is here, as in the case of sale by sample or by description, that both a condition and warranty are implied; so that the vendee would have his election of remedy, although it does not seem likely that any other remedy than repudiation of the sale would prove effective in the sale of counterfeit securities.

<sup>1</sup> See *ante*, § 197.

<sup>2</sup> *Lorymer v. Smith*, 1 Barn. & C. 1; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Hedstrom v. Toronto Car Wheel Co.*, 31 Up. Can. C. P. 425; *Nichols v. Godts*, 10 Ex. 1; *Azemar v. Casella*, L. R. Q. C. P. 431; 86 L. J. C. P. 124; *Pennock v. Stygles*, 54 Vt. 226; *Wolcott v. Mount*, 36 N. J. L. 266; *Woods v. Miller*, 55 Iowa, 168; *Carson v. Baillie*, 19 Pa. St. 375; *Bannerman v. White*, 10 C. B. (N. S.) 844; *Grimoldby v. Wells*, L. R. 10 C. P. 391. See *Neave v. Arntz*, 56 Wis. 174; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Jones v. George*, 61 Tex. 345. And see *Harley v. Iron Works*, 66 Cal. 238; *McFarland v. Newman*, 9 Watts, 55; *Cary v. Gruman*, 4 Hill, 626.

<sup>3</sup> *Young v. Cole*, 3 Bing. N. C. 724; *Westropp v. Solomon*, 3 C. B. 345; *Gompertz v. Bartlett*, 2 El. & B. 849.

<sup>4</sup> See *Aldrich v. Jackson*, 5 R. I. 218; *Merriam v. Wolcott*, 3 Allen, 258; *Wood v. Sheldon*, 42 N. J. L. 421; *Donaldson v. Newman*, 9 Mo. App. 235; *Ledwich v. McKim*, 53 N. Y. 307.

§ 216. Remedies for the breach of a condition.— Where the condition is to be performed by the vendor, the vendee may avoid the contract, tender a return of the goods, and sue for the price, if he has paid. In any case, he is relieved of all liability on the contract by his tender of a return of the goods, and a notification of his repudiation of the contract.<sup>1</sup> Where the condition is to be performed by the vendee, the vendor may avoid the contract and recover the possession of the goods.<sup>2</sup> And if he has reserved the right to retake the goods on default of the condition, he may enter the buyer's premises for the purpose of getting possession of the goods.<sup>3</sup> If the thing which is sold upon condition is attached to a house in such a way that it cannot be removed without injury to the building, the remedy will be an action for the value of the thing, and as security the vendor will have a lien on the land for that amount.<sup>4</sup> And he also has the right to recover damages for any injury which the buyer may have done to the property while in her possession.<sup>5</sup>

§ 217. Waiver of conditions—Effect of delivery in cash transactions—Effect of delay in enforcing forfeiture.— The performance of a condition may, of course, be waived by the party who has the right to enforce it, and if a waiver is clearly established, the condition need not be performed; nor can the vendor, if the performance of the condition devolved on the vendee, recover the property.

<sup>1</sup> See *ante*, §§ 209–211.

<sup>2</sup> *Solomon v. Hathaway*, 126 Mass. 482; *Keitt v. Counts*, 15 S. C. 498; *Brown v. Haynes*, 52 Me. 578.

<sup>3</sup> *McClelland v. Nichols*, 24 Minn. 176; *Matthews v. Lucia*, 55 Vt. 308; *Walsh v. Taylor*, 39 Md. 592. But the vendor would not be permitted to use force in retaking his property, although he has reserved the right of entry on the vendee's premises. *Van Wren v. Flynn*, 34 La. An. 1158; *Churchill v. Hulbert*, 110 Mass. 42; *Drury v. Hervey*, 126 Mass. 519.

<sup>4</sup> *Cooper v. Cleghorn*, 50 Wis. 113.

<sup>5</sup> *Kent v. Buck*, 45 Vt. 18.



Waivers may be express, or implied from the acts and words of the party who is to enforce the condition, and in any case it is a question of fact, whether the condition is waived.<sup>1</sup> But the act of waiver is an intentional act, so that the acts and words must show an intention to waive the right of enforcing the condition, in order to constitute a waiver.<sup>2</sup> And although mere delay or negligence in the enforcement of the condition does not in itself amount to a waiver,<sup>3</sup> it is a fact from which, if it be not explained by the proof of facts which makes the delay reasonable or inevitable,<sup>4</sup> waiver may be inferred.<sup>5</sup>

The most common case of implied waiver of the condition is in the case of a cash sale in which the condition is that the price must be paid on or before delivery. If the goods are delivered without payment, it is presumed that the condition precedent was waived, and the title passes absolutely to the vendee on delivery of the goods.<sup>6</sup> But this presumption is not conclusive, and may be rebutted by the proof of a mercantile custom to enforce the condition notwithstanding the delivery,<sup>7</sup> or by the inference of a con-

<sup>1</sup> *Fishback v. Van Dusen*, 83 Minn. 118.

<sup>2</sup> *Fishback v. Van Dusen*, 83 Minn. 117; *Fuller v. Bean*, 32 N. H. 290; *Farlow v. Ellis*, 15 Gray, 229; *Hammett v. Linnemann*, 48 N. Y. 399; *Smith v. Dennie*, 6 Pick. 262.

<sup>3</sup> *Fishback v. Van Dusen*, 83 Minn. 117; *Farlow v. Ellis*, 15 Gray, 229.

<sup>4</sup> *Stone v. Perry*, 60 Me. 48; *Whitney v. Eaton*, 15 Gray, 225; *Goldsmith v. Bryant*, 26 Wis. 34; *Hirschorn v. Canney*, 98 Mass. 148; *Scudder v. Bradbury*, 106 Mass. 422.

<sup>5</sup> *Smith v. Dennis*, 6 Pick. 262; *Hutchings v. Munger*, 41 N. Y. 155; *Fishback v. Van Dusen*, 83 Minn. 111. See *Mixer v. Cook*, 31 Me. 340; *Scudder v. Bradbury*, 106 Mass. 427; *Goldsmith v. Bryant*, 26 Wis. 34; *Bowen v. Burk*, 13 Pa. St. 146.

<sup>6</sup> *Fishback v. Van Dusen*, 83 Minn. 111; *Smith v. Lynes*, 5 N. Y. 41; *Hammett v. Linneman*, 48 N. Y. 399; *Farlow v. Ellis*, 15 Gray, 229; *Scudder v. Bradbury*, 106 Mass. 422; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Caldwell v. Bartlett*, 3 Duer, 341; *Marston v. Baldwin*, 17 Mass. 606; *Pitts v. Owen*, 9 Wis. 152; *Hennequin v. Sands*, 25 Wend. 640.

<sup>7</sup> *Farlow v. Ellis*, 15 Gray, 229; *Banendahl v. Horr*, 7 Blatchf. C. C., 548; *Fleeman v. McKean*, 25 Barb. 474.

trary intention from facts and words, accompanying the delivery.<sup>1</sup> And if the goods are delivered with the understanding that the purchaser is to make an immediate payment, the condition is not waived by the delivery, and the vendor may regain the goods, if the vendee refuses or fails to pay the price.<sup>2</sup>

The right of forfeiture for one breach of a condition, which is performable in installments, is always waived by the subsequent acceptance of performance of the condition. And if the condition be the prepayment of the price, the buyer is under these circumstances entitled to the possession and title of the goods when he tenders payment of the whole price.<sup>3</sup>

The mere mental determination to waive the performance of the condition will, if uncommunicated by acts or words, not constitute a waiver.<sup>4</sup>

§ 218. **Impossibility of performance—Illegality of condition—Obstruction of performance by other party.**—If it is impossible in the legal sense to perform the condition, it will have the same effect as if it were no condition at all, and the parties will be left, in respect to the goods sold upon condition, in the same state in which they are found independently of the condition. If the condition is subsequent, and the vendee has taken the title subject to forfeiture for the breach of the condition, the impossibility of performance will convert his title into an absolute one, by the virtual removal of the condition from it.<sup>5</sup> But if the

<sup>1</sup> *Farlow v. Ells*, 15 Gray, 229; *Seed v. Lord*, 66 Me. 580; *Fishback v. Van Dusen*, 83 Minn. 111.

<sup>2</sup> *Bussey v. Barrett*, 9 M. & W. 312; *Kenney v. Ingalls*, 126 Mass. 488. See *ante*, § 85.

<sup>3</sup> *Hutchings v. Munger*, 41 N. Y. 155. And see, also, *Cushman v. Jewell*, 7 Hun, 525; *Blair v. Hamilton*, 48 Ind. 32; *Taylor v. Finley*, 48 Vt. 78. See *ante*, §§ 209, 210.

<sup>4</sup> *Maxwell v. Briggs*, 17 Vt. 176.

<sup>5</sup> *Co. Lit.* 206; *Taylor v. Mason*, 9 Wheat. 325; *Van Horne's Lessee*

condition is precedent, and the terms of the sale therefore provide that the title shall not pass to the vendee, but remain in the vendor until the performance of the condition, since there cannot be under the contract any transfer of title to the vendee independently of the performance of the condition, the impossibility of performance will leave the title to the goods in the vendor, and does not differ in its effect in this respect from inexcusable non-performance of the condition.<sup>1</sup>

But in order that the impossibility of performance may release the party obligor from the condition, it must be an inherent impossibility and not a mere personal disability. For example, want of means with which to pay the price is a disability and not an inherent impossibility. If there is no express reservation of release from the condition on account of personal disability, if the thing is not inherently impossible, the party will be bound by his condition, although its performance will be a very serious hardship and burden to him.<sup>2</sup> But it is not every general impossibility which the courts will hold to be sufficient to relieve the party from his obligation of performance. It is very difficult to lay down any very general rule, whereby to determine what kinds of impossibility will be sufficient to waive the performance of a condition; but an attempt

*v. Dorrance*, 2 Dall. 317; *Mizell v. Burnett*, 4 Jones, L. 249; *Martin v. Ballou*, 13 Barb. 119. These cases are from the law of real property, but the same principle applies to conditional sales of both real and personal property.

<sup>1</sup> *Co. Lit.* 206a; *Walker's Am. Law*, 298; *Brandon v. Robinson*, 18 Ves. 429; *Bradley v. Peixoto*, 3 Ves. 324; *Blackstone Bank v. Davis*, 12 Pick. 42; *Hughes v. Edwards*, 9 Wheat. 489; *Badlam v. Tucker*, 1 Pick. 284; *Merrill v. Emery*, 10 Pick. 507; *Taylor v. Sutton*, 15 Ga. 103; *Jones v. Doe*, 2 Ill. 276; *Gadberry v. Sheppard*, 27 Miss. 203. These cases are all taken from the law of real property.

<sup>2</sup> *Oakley v. Morton*, 11 N. Y. 25; *Booth v. Spuyten Duyvil Rolling Mill*, 60 N. Y. 487; *Smoot's Case*, 15 Wall. 36; *James v. Morgan*, 1 Lev. 111; *Thornburg v. Whitacre*, 2 Ld. Raym. 1164; *Kearon v. Pearson*, 7 Hurl. & N. 386.

will be made to enumerate the cases in which the impossibility of performance is a good defense to an action on the condition.

In the first place, if the impossibility arises from a prohibition of the law; or if, in other words, the condition calls for the doing of an illegal act, it is invalid, and the performance of it cannot be required.<sup>1</sup> The performance of the condition is also excused, if its performance has been prevented by the obstruction of the other party to the contract,<sup>2</sup> by the subsequent destruction of the subject-matter of the condition,<sup>3</sup> by the sickness of the party who was to perform the condition, where the performance involves the personal skill of that particular individual.<sup>4</sup> But in all of these cases there is an implied counter condition against liability for non-performance of the condition. And the cases seem to hold that where no counter condition is implied by law, impossibility of performance does not constitute a defense to an action for the breach of the condition, in the absence of an express limitation of liability.<sup>5</sup>

<sup>1</sup> *Bailey v. De Crespigny*, L. R. 4 Q. B. 180; *Newby v. Sharp*, L. R. 8 Ch. D. 39. See *post*, Chap. XX., on illegal contracts.

<sup>2</sup> *Lone v. Dolger*, 6 Roberts, 256; *Wolf v. Marsh*, 54 Cal. 228; *Bolton v. Riddle*, 35 Mich. 13; *Sullings v. Goodyear Dental Co.*, 36 Mich. 313; *United States v. Peck*, 102 U. S. 64; *Ketchum v. Zellsdorf*, 26 Wis. 514; *Fleming v. Gilbert*, 3 Johns. 528.

<sup>3</sup> *Dexter v. Norton*, 47 N. Y. 62; *Gould v. Murch*, 70 Me. 288; *Thompson v. Gould*, 20 Pick. 139; *Wells v. Calnan*, 107 Mass. 514; *Thomas v. Knowles*, 128 Mass. 22.

<sup>4</sup> *Fenton v. Clark*, 11 Vt. 568; *Dickinson v. Calahan*, 19 Pa. St. 227; *Caden v. Farwell*, 98 Mass. 137; *Dickey v. Linscott*, 20 Me. 453; *Knight v. Bean*, 22 Me. 536; *Fuller v. Brown*, 11 Met. 440.

<sup>5</sup> *Eddy v. Clement*, 38 Vt. 486, where a sale of lumber within a stated time, became unperformable within the time in consequence of a drought, which stopped the running of all the sawmills; *Harmony v. Bingham*, 12 N. Y. 99, where the contract to carry goods from New York to Missouri within 26 days, became impossible by an unexpected freshet. See, also, to same effect, *Bacon v. Cobb*, 45 Ill. 47; *Tompkins v. Dudley*, 25 N. Y. 272; *School Trustees v. Bennett*, 27 N. J. L. 514; *Stees v. Leonard*,

§ 219. **Equitable relief against forfeiture.** — As a general rule, equity will neither relieve against, nor enforce, a forfeiture for the breach of a condition. It simply leaves the parties to their remedies at law. Where the breach is the result of an unlooked for accident, and where the damages resulting therefrom can be accurately estimated by the court, as where the condition calls for the payment of a sum of money at a particular time—it may be a debt or it may be a gift or a rent charge, equity will prevent a forfeiture and decree, instead thereof, as compensation in damages, the payment of the sum of money together with interest for the time which has elapsed.<sup>1</sup> But if the condition be some act, collateral to the grant, and one which cannot be estimated in damages, or where the breach is not the result of inevitable accident, but is willfully or negligently committed, equity will not interfere.<sup>2</sup>

20 Minn. 494; *Gilpins v. Consequa*, 1 Pet. C. C. 86; *Dermott v. Jones*, 2 Wall. 1; *School Dist. v. Dauchy*, 25 Conn. 580; *Adams v. Nichols*, 19 Pick. 275.

<sup>1</sup> The following cases are taken from the law of real property, but the principle is the same, whether the condition is annexed to real or personal property. *Goodtitle v. Holdfast*, 2 Strange, 900; *Hill v. Barclay*, 18 Ves. 56; *Stone v. Ellis*, 9 Cush. 95; *Atkins v. Chilson*, 11 Met. 112; *Bethlehem v. Anns*, 40 N. H. 34; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Williams v. Angell*, 7 R. I. 152; *Beatey v. Harkey*, 2 Smed. & M. 563; *Warner v. Bennett*, 31 Conn. 478; *City Bank v. Smith*, 3 Gill & J. 265; *Hancock v. Carlton*, 6 Gray, 39.

<sup>2</sup> The following cases are from law of real property: *Hill v. Barclay*, 18 Ves. 56; *Elliott v. Turner*, 13 Sim. Ch. 485; *Reynolds v. Pitt*, 2 Price, 212; *Henry v. Tupper*, 29 Vt. 56; *Bacon v. Huntington*, 14 Conn. 92; *Livingston v. Thompkins*, 4 Johns. Ch. 431; *City Bank v. Smith*, 3 Gill & J. 265; *Baxter v. Lansing*, 7 Paige Ch. 350; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Dunkley v. Adams*, 20 Vt. 415; *Hancock v. Carlton*, 6 Gray, 39; *Wafer v. Mocato*, 9 Mod. 112; *Descarlett v. Dennett*, 9 Mod. 22.

## CHAPTER XVI.

### CHATTEL MORTGAGES.

- SECTION 221.** Chattel mortgages defined — Conflict of common law and equitable theories — Equity of redemption.
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§ 221. **Chattel mortgage defined — Conflict of common law and equitable theories — Equity of redemption.** — A mortgage of personal property, according to the common law, is a sale or transfer of the title to the property upon the condition that if a debt of the grantor is paid when it falls due, the sale will become void and the title revert, otherwise to remain in full force. Upon the breach of the condition, the title becomes absolute in the grantee.<sup>1</sup> The chattel mortgage, therefore, is nothing more than a conditional sale, in which the condition is the payment of a debt. For this reason, no work on the law of sales can be considered complete without including a full discussion of the law of chattel mortgages.<sup>2</sup>

If the mortgagor of a common-law mortgage, of real as well as of personal property, failed to perform the condition at the agreed time, the title to the property became absolute in the mortgagee, even though the estate may have been worth much more than the mortgage debt.<sup>3</sup> There was no remedy by which the mortgagor could enforce the acceptance of payment after the breach of the condition, even where his failure arose from some accident or unavoidable delay, or where the payment of the debt with interest to date of the tender of payment would do no injury to the mortgagee. This rigorous rule of the common law did not fail to be productive of great injustice in many instances, and like all cases of hardships resulting from the technicality of the common law it attracted the attention of the Court of Chancery. A long contest ensued between these courts from the time of the *Magna Charta* until the reign of

<sup>1</sup> Parshall v. Eggert, 52 Barb. 367; Porter v. Parmly, 48 How. Pr. 445; 34 N. Y. S. C. 398; Tompkins v. Batie, 11 Neb. 147, 151; Miner v. Judson, 2 Hun, 441; Mowry v. Wood, 12 Wis. 413.

<sup>2</sup> In all other treatises on sales, this important branch of the subject has been omitted.

<sup>3</sup> Fay v. Cheney, 14 Pick. 399; Wood v. Trask, 7 Wis. 566; Brigham v. Winchester, 1 Met. 390; Wade's Case, 5 Rep. 115.

James I., when chancery acquired jurisdiction over questions arising out of mortgages, and decreed that the mortgagor may become entitled to redeem his property, after condition broken, by the payment of the debt and interest, and in the reign of Charles I., the law of mortgages was firmly established as a branch of equity jurisprudence.<sup>1</sup> This right of the mortgagor to redeem the property after the breach of the condition was recognized only in a court of equity. The legal title, as viewed from the legal standpoint, was still considered to be absolute in the mortgagee, and discharged of all rights of the mortgagor in and to the property. The right to redeem was therefore no legal right. It was simply an equity, and hence was called the **EQUITY OF REDEMPTION.**<sup>2</sup>

As a result of this equitable jurisdiction, mortgages, both real and personal, assumed in equity a different character from what they had in law. Equity seized hold of the real intention of the parties and construed the mortgage to have only the effect of a lien, instead of being a conditional sale, whereby a defeasible title to the property became vested in the grantee. The purposes of the parties are fully carried out under this theory of a lien, while the hardships of the common law forfeiture for the breach of the condition are avoided. Equity treated a mortgage, therefore, as a lien, instead of a conditional sale. This is necessarily involved in a recognition of the right of redemption.<sup>3</sup>

<sup>1</sup> 1 Spence Eq. Jur. 603; Jones on Mortg., § 6; How v. Vignes, 1 Rep. in Ch. 32; Emanuel College v. Evans, 1 Rep. in Ch. 18; Roscarrick v. Barton, 1 Cas. in Ch. 217; Casborne v. Scarfe, 1 Atk. 608; Willette v. Winnelly, 1 Vern. 488; Price v. Perrie, 2 Freem. 258.

<sup>2</sup> See *post*, § 247.

<sup>3</sup> Flanders v. Chamberlain, 24 Mich. 305, 318; Davis v. Hubbard, 38 Ala. 185, 189; Sidener v. Bible, 48 Ind. 230; Woodward v. Wilcox, 27 Ind. 207; Blakemore v. Taber, 22 Ind. 466; Tritipo v. Edwards, 35 Ind. 467; Broadhead v. McKay, 46 Ind. 595; Evans v. Merriken, 8 Gill & J. 39; Headley v. Goundray, 41 Barb. 282; Jackson v. Willard, 4 Johns. 41; Kinna v. Smith, 2 Green. Ch. 14; Runyan v. Mersereau, 11 Johns. 584;



But, at this point, in the development of the law, chattel mortgages and the mortgages of real property part company. As soon as equity assumed jurisdiction over mortgages, it began to exert a potent influence over the development of the law in respect to the mortgages of real property, and has more or less superseded the common-law theories in respect to the character of the real estate mortgage and the rights and interests of the mortgagor and mortgagee, so that the incidents of the real estate mortgage, as unfolded by the modern law of mortgages, are everywhere more in harmony with the equitable lien theory than with the common-law theory of an estate upon condition.<sup>1</sup> But for some inexplicable reason, — unless it be that chattel mortgages, until recently, have been comparatively rare, and hence the same opportunity has not been present for a modification of their legal character through the influence of the equitable doctrines, — the same radical variation from the common-law definition of a mortgage is not to be noticed in the case of a chattel mortgage. Although the right of redemption after condition broken is conceded to the mortgagor of a chattel mortgage, it is, in the absence of statute, strictly an equitable remedy, not recognized in a court of law.<sup>2</sup> After condition broken, no other right than the right of redemption is recognized as belonging to the mortgagor,<sup>3</sup> and the universal judicial opinion is that, in

*Eaton v. Whiting*, 3 Pick. 484; *Anderson v. Baumgartner*, 27 Mo. 80; *Ragland v. Justices*, 10 Ga. 65; *Hannah v. Carrington*, 18 Ark. 85; *Matthews v. Wallwyn*, 4 Ves. 118; 4 Kent's Com. 138; *Timms v. Shannon*, 19 Md. 296; *McMillan v. Richards*, 9 Cal. 365; *Myers v. White*, 1 Rawle, 353; *Whitney v. French*, 25 Vt. 663; *Ellison v. Daniels*, 11 N. H. 280; *Deedly v. Cadwell*, 19 Conn. 218; *Hughes v. Edwards*, 9 Wheat. 500; *Creen v. Hart*, 1 Johns. 580.

<sup>1</sup> Tiedeman on Real Prop., § 301.

<sup>2</sup> *Evans v. Merriken*, 8 Gill & J. 39; *Wood v. Dudley*, 8 Vt. 430; *Charter v. Stevens*, 3 Denio, 33; *Bunacleigh v. Poolman*, 3 Daly, 296; *Hulson v. Walter*, 34 How. Pr. 385; *Porter v. Parmly*, 43 How. Pr. 445; 34 N. Y. S. C. 398.

<sup>3</sup> *Boyd v. Beandin*, 54 Wis. 193, 198; *Leach v. Kimball*, 34 N. H.

law, the title of the mortgagee to the goods becomes absolute upon the breach of the condition, subject only to the mortgagor's right of redemption.<sup>1</sup> The only apparent exceptions to this general rule seem to be found in Michigan and Oregon, where the chattel mortgage is treated as a lien, and the title is not held to become absolute in the mortgagee upon breach of the condition as at common law.<sup>2</sup>

The mortgagor's right of redemption is the chief distinction between the chattel mortgage and the ordinary conditional sale.<sup>3</sup>

<sup>1</sup> Langdon v. Buel, 9 Wend. 80; Achley v. Finch, 7 Cow. 290; Fox v. Burns, 12 Barb. 677; Byron v. May, 2 Chand. 108; Anderson v. Hunn, 5 Hun, 79; Fuller v. Acker, 1 Hill, 473; Flanders v. Thomas, 12 Wis. 410; Talman v. Smith, 39 Barb. 390; Butler v. Miller, 1 N. Y. 496; Brown v. Bement, 8 Johns. 96; Brown v. Lipscomb, 9 Port. (Ala.) 472; Heyland v. Badger, 35 Cal. 404; Wright v. Ross, 36 Cal. 414; Rhines v. Phelps, 3 Gilm. 455; Constant v. Matteson, 22 Ill. 546; Simmons v. Jenkins, 76 Ill. 479; Pike v. Colvin, 67 Ill. 227; Bean v. Barney, 10 Iowa, 498; Winchester v. Ball, 54 Me. 558; Merchant's Nat. Bank v. McLaughlin, 1 McCrary, 258; 2 Fed. Rep. 128; Thornhill v. Gilmer, 4 Smed. & M. 158; Bowens v. Benson, 57 Mo. 26; Leach v. Kimball, 34 N. H. 568; Woodside v. Adams, 40 N. J. L. 417, 427; Patchin v. Pierce, 12 Wend. 61; 1 Hill, 473; Moody v. Haselden, 1 S. C. 129; Nichols v. Webster, 1 Chandl. 208; Musgat v. Pumpelly, 46 Wis. 660; Smith v. Coolbaugh, 21 Wis. 427; Lowe v. Wing, 13 N. W. Rep. 892 (1882) Wis.; Smith v. Koust, 50 Wis. 360; Smith v. Phillips, 47 Wis. 202; Blodgett v. Blodgett, 48 Vt. 32; Hulsen v. Walter, 34 How. Pr. 385; Hall v. Snowhill, 2 Green (N. J.) 8; Bryant v. Carson River Lumbering Co., 3 Nev. 313; Robinson v. Campbell, 8 Mo. 365; s. c. 615; Volney Stamps v. Gilman, 43 Miss. 456; Flanders v. Barstow, 18 Me. 357; Brown v. Phillips, 3 Bush, 656; Fikes v. Manchester, 43 Ill. 379; Durfee v. Grinnell, 69 Ill. 371; McConnell v. People, 84 Ill. 583; Larmon v. Carpenter, 70 Ill. 549; In re Haake, 2 Sawy. 231; Moore v. Murdock, 26 Cal. 514; Mervine v. White, 50 Ala. 388. And where the debt is payable in installments, default in the payment of the first installment will cause the title to become absolute in the mortgagee. Flanders v. Barstow, 18 Me. 357; Halstead v. Swartz, 1 T. & C. (N. Y.) 559; Pulver v. Richardson, 3 T. & C. 436; Burton v. Tannehill, 6 Blackf. 470; Murray v. Erskine, 109 Mass. 597.

<sup>2</sup> Kohl v. Lynn, 34 Mich. 360; Lucking v. Wesson, 25 Mich. 443; Cary v. Hewitt, 26 Mich. 228; Baxter v. Spencer, 33 Mich. 326; Chapman v. State, 5 Oreg. 432.

<sup>3</sup> See post, § 247.

§ 222. **Conditional transfer of title essential to a chattel mortgage — Mortgage distinguished from a lien.**— An absolute essential of a chattel mortgage is an immediate transfer of title upon condition of defeasance upon payment of the debt to secure which the mortgage was given. In other words, the transaction must have the characteristic of a sale upon condition subsequent. There is scarcely any limit to the informality in the execution of the mortgage, any instrument, which indicates the intention to transfer a title to the goods subject to defeasance, being held to be a good chattel mortgage.<sup>1</sup> But if the instrument does not operate as a grant upon condition, it is not a mortgage at common law.<sup>2</sup> If possession is delivered, it may operate as a pledge.<sup>3</sup> If neither possession nor title is transferred, but a power to sell the goods on default of payment of the debt is given, it will operate as the grant of a naked power of sale, which only binds the property and transfers the title when the sale is made.<sup>4</sup> And where words are used, which indicate an intention to create a lien on the property, but the words used cannot be construed to require or call for the transfer of title to the goods, it will operate as a lien and be enforced as such in a court of equity, or in a court having equitable jurisdiction.<sup>5</sup> But

<sup>1</sup> *Farmers', &c., Bank v. Lang*, 87 N. Y. 209; *Bunacleugh v. Poolman*, 3 Daly, 236; *Fowler v. Stoneum*, 11 Tex. 478; *Hart v. Burton*, 7 J. J. Marsh. 322; *McKnight v. Gordon*, 13 Rich. Eq. 221; *Bissell v. Hopkins*, 3 Cow. 166; *Ross v. Ross*, 21 Ala. 322; *Moore v. Murdock*, 26 Cal. 514; *Ford v. Ransom*, 39 How. Pr. 429; *Joyner v. Vincent*, 4 D. & B. (N. C.) L. 512; *Bartels v. Harris*, 4 Me. 146; *Barfield v. Cole*, 4 Sneed, 465; *Gifford v. Ford*, 5 Vt. 532; *Blodgett v. Blodgett*, 48 Vt. 32; *Cooper v. Brock*, 41 Mich. 488; *Musgat v. Pumpelly*, 46 Wis. 660; *McFadden v. Turner*, 3 Jones (N. C.) L. 481. See also *post*, § 226.

<sup>2</sup> *Parshall v. Eggart*, 52 Barb. 367.

<sup>3</sup> See *post*, § 223.

<sup>4</sup> *Neidig v. Elfer*, 18 Abb. Pr. 353; *Bousey v. Amee*, 8 Pick. 286; *Barrett v. Mason*, 7 Ark. 253; *McGriff v. Porter*, 5 Fla. 373; *Holmes v. Hall*, 8 Mich. 66; *Parshall v. Eggart*, 52 Barb. 367.

<sup>5</sup> *Sawyer v. Fisher*, 32 Me. 28; *Shaw v. Wilshire*, 65 Me. 485; *Metcalf*

the transaction must be something more than an executory agreement to give a mortgage or lien, in order that it may in equity operate as a lien or mortgage, as against creditors and subsequent purchasers.<sup>1</sup>

But it must be observed that this distinction between a lien and a mortgage only obtains where the common-law notion of the character of a chattel mortgage obtains and is recognized. In a court of equity, therefore, where the mortgage is held to have the characteristics of a lien in every respect, the distinction disappears altogether, and we find that the intention to make a mortgage will be effectuated in equity, although the parties did not employ words of conveyance in their instruments of writing.<sup>2</sup> And inasmuch as courts of law and of equity have been amalgamated in many of the States, we find the same view often taken of an instrument by a court that does not distinctly appear to have equity powers.<sup>3</sup>

§ 223. **Mortgages distinguished from pledges.** — Mortgages differ from pledges in two important respects: *First*, in that the mortgage involves a conditional transfer of the title to the goods to the mortgagee, whereas the pledgee

*v. Fosdick*, 23 Ohio St. 114; *Barnett v. Mason*, 7 Ark. 253; *Bousey v. Ameer*, 8 Pick. 286; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Dalton v. Landahn*, 27 Mich. 529; *Polk v. Foster*, 7 Baxt. 98; *Goddard v. Coe*, 55 Me. 385; *Crane v. Pearson*, 49 Me. 97; *Gushee v. Robinson*, 40 Me. 412.

<sup>1</sup> *Platt v. Stewart*, 13 Blatchf. 481; *Newsom v. Beard*, 45 Tex. 151.

<sup>2</sup> *Whiting v. Eichelberger*, 16 Iowa, 422; *Evington v. Smith*, 66 Ala. 393.

<sup>3</sup> *Ellington v. Charleston*, 51 Ala. 166; *Evington v. Smith*, 66 Ala. 398; *De Leon v. Higuera*, 15 Cal. 483; *Nichols v. Hampton*, 46 Ga. 253; *Dunning v. Stearns*, 9 Barb. 630; *Talmadge v. Oliver*, 14 S. C. 522; *Langdon v. Buel*, 9 Wend. 80; *Johnson v. Crofoot*, 53 Barb. 574; 87 How. Pr. 59; *Thompson v. Blanchard*, 4 N. Y. 303; *Wright v. Bircher*, 5 Mo. App. 322; *s. c.* 72 Mo. 179; *Weed v. Standley*, 12 Fla. 166; *Whiting v. Eichelberger*, 16 Iowa, 422; *Mitchell v. Badgett*, 33 Ark. 387; *Valentine v. Washington*, 33 Ark. 795; *Byrd v. Wilcox*, 8 Bax. 65; *Lee v. Clark*, 60 Ga. 639; *Mervine v. White*, 50 Ala. 388; *Harris v. Jones*, 88 N. C. 317.

acquires only a special property in the pledge, while the general property remains in the pledgor, until the pledge is sold to satisfy the claim of the pledgee.<sup>1</sup> In consequence of this difference of title in the mortgagee and pledgee, respectively, their rights in the property vary on the breach of the condition. The mortgagee's title to the goods becomes absolute, and the mortgagor is divested of all rights in and to them, except that he has still his equity of redemption.<sup>2</sup> In the case of the pledge, the title remains in the pledgor notwithstanding the default in payment of the debt, and he is divested of his title only when the property is sold by the pledgee.<sup>3</sup>

The second point of distinction between the mortgage and pledges, is that while both mortgagee and pledgee are usually entitled to the possession of the goods, immediately on the creation of the mortgage and pledge, respectively, the pledge cannot exist without a transfer of possession to the pledgee, whereas the validity of the mortgage is not at all affected by the mortgagor's retention of the possession;<sup>4</sup> and it is very common, not only for the mortgagor to retain possession, but for the mortgage to contain a provision reserving to the mortgagor the right to the possession.<sup>5</sup>

Very often, where the property is a written instrument of indebtedness, such as a note or bond<sup>6</sup> or the title to the

<sup>1</sup> *Walker v. Stapels*, 5 Allen, 34; *Gifford v. Ford*, 5 Vt. 532; *White v. Cole*, 24 Wend. 116; *Wright v. Ross*, 36 Cal. 414; *Tannahill v. Tuttle*, 3 Mich. 104; *Conner v. Carpenter*, 28 Vt. 237; *Evans v. Darlington*, 5 Blackf. 320; *Eastman v. Avery*, 23 Me. 248; *Day v. Swift*, 48 Me. 368; *Beeman v. Lawton*, 37 Me. 543; *Jordan v. Turner*, 3 Blackf. 309; *Sims v. Canfield*, 2 Ala. 555; *Dook v. Bank of the State*, 6 Ired. L. 309; *Heyland v. Badger*, 35 Cal. 404; *Barfield v. Cole*, 4 Sneed, 465; *Brown v. Bement*, 8 Johns. 96; *Wood v. Dudley*, 8 Vt. 430.

<sup>2</sup> See *ante*, § 221; and *post*, § 247.

<sup>3</sup> See *Jones on Pledges*, § 9.

<sup>4</sup> *Barsow v. Paxton*, 5 Johns. 258; *Parshall v. Eggart*, 52 Barb. 367.

<sup>5</sup> See *post*, § 241.

<sup>6</sup> *Tiedeman on Commercial Paper*, § 304.

goods hypothecated is evidenced by a symbolical instrument in writing, such as a bill of lading,<sup>1</sup> or warehouse receipt, in the transfer of possession of the written instrument, there may also be a transfer of title; and this is particularly true where the transfer of possession is accompanied by an indorsement of the paper.<sup>2</sup> But, except where the assignment is made in the form of a mortgage and contains some sort of a defeasance, it is a question of intention whether the apparent transfer of the title would operate as a mortgage or as a pledge.<sup>3</sup> And in the absence of a proof of intention, the transaction is presumed to be a pledge, instead of a mortgage.<sup>4</sup>

But where the instrument takes the form of a mortgage, parol evidence is inadmissible to show that the parties intended the transaction to be only a pledge.<sup>5</sup>

Where the transaction is parol and possession is delivered, the difficulty of determining whether it is a mortgage or a pledge increases, but it is simply a question of intention of the parties.<sup>6</sup>

**§ 224. Chattel mortgages distinguished from conditional sales, with the right to repurchase.** — Inasmuch as the mortgagor has a right to redeem the property from the mortgage, notwithstanding default has been made, and the legal title to the property has thus become absolute in the mortgagee, it is very important to distinguish a chattel

<sup>1</sup> *Casey v. Cavaroc*, 96 U. S. 467, 477.

<sup>2</sup> *Wright v. Ross*, 86 Cal. 442; *Tyler v. Strang*, 21 Barb. 198; *Casey v. Cavaroc*, 96 U. S. 466, 477.

<sup>3</sup> *Janvin v. Fogg*, 49 N. H. 340, 351; *Whiting v. Eichelberger*, 16 Iowa, 422; *Wright v. Bircher*, 5 Mo. App. 322; *Warren v. Emerson*, 1 Curtis, 239; *Cooper v. Whitney*, 8 Hill, 95, 101; *Palmer v. Gurnsey*, 7 Wend. 248; *Wright v. Ross*, 86 Cal. 414.

<sup>4</sup> *Haskins v. Kelly*, 1 Rob. 160; 1 Abb. Pr. (N. S.) 63; *Jones on Pledges*, § 9; *Tiedeman on Commercial Paper*, § 304.

<sup>5</sup> *Whitney v. Lowell*, 83 Me. 318.

<sup>6</sup> *Beeman v. Lawton*, 37 Me. 543; *Bardwell v. Roberts*, 66 Barb. 433. See *post*, § 225.

mortgage from the conditional sales which sometimes bear so close a resemblance to the mortgage as to be difficult to distinguish from each other.

The instrument is necessarily a mortgage, if it is based upon a debt, to secure the payment of which the transfer has been made. And where there is a debt between the parties, the presumption is that the transfer was a mortgage to secure the payment of the debt. This presumption is very strong where the debt was contracted contemporaneously with the transfer;<sup>1</sup> but, although the presumption is also in favor of a mortgage, where the debt was antecedent to the transfer<sup>2</sup> in that case it is not so strong, and will be rebutted by comparatively slight evidence of an intention to satisfy the debt by a sale.<sup>3</sup> But even where the debt is contemporaneous, the presumption may be rebutted by facts which show an intention to make a conditional sale instead of a mortgage.<sup>4</sup> But in the latter case the evidence in rebuttal is required to be comparatively strong. If, however, the intention of the parties is shown to be to secure the payment of the debt, the presumption to give a mortgage becomes conclusive, parol evidence being inadmissible to rebut it.<sup>5</sup> Whenever, in view of all

<sup>1</sup> *Sewall v. Henry*, 9 Ala. 24, 34; *Perkins v. Drye*, 3 Dana, 170; *Ross v. Ross*, 21 Ala. 322; *Weathersby v. Weathersby*, 40 Miss. 462; *Locke v. Palmer*, 26 Ala. 312; *Smith v. Quartz Mining Co.*, 14 Cal. 242.

<sup>2</sup> *Dabney v. Green*, 4 H. & M. (Va.) 101; *Folsom v. Fowler*, 15 Ark. 280.

<sup>3</sup> *Poindexter v. McCannon*, 1 Dev. Eq. 377; *M'Ginnis v. Hart*, 4 Bibb, 327; *Bishop v. Rutledge*, 7 J. J. Marsh. 217; *Hart v. Burton*, 7 J. J. Marsh. 322; *Eiland v. Radford*, 7 Ala. 724; *Hickman v. Cantrell*, 9 Yerg. 172; *Magee v. Catching*, 33 Miss. 672; *Haynie v. Robertson*, 58 Ala. 37; *Harrison v. Lee*, 1 Litt. 191; *Sewall v. Henry*, 9 Ala. 31. The surrender of the instrument of indebtedness is proof of intention to make a conditional sale instead of a mortgage (*McKinstry v. Conly*, 12 Ala. 678), but not conclusive proof. *Locke v. Palmer*, 26 Ala. 312.

<sup>4</sup> *Quirk v. Rodman*, 5 Duer, 285; *Moss v. Green*, 10 Leigh, 251.

<sup>5</sup> *Kelly v. Thompson*, 7 Watts, 401; *Trucks v. Lindsay*, 18 Iowa, 505; *Page v. Foster*, 7 N. H. 392; *Flagg v. Mann*, 14 Pick. 483; *Pearson v. Seay*, 35 Ala. 612; *De France v. De France*, 34 Pa. St. 385; *Rice v. Rice*,

the known facts of the case, it appears to be doubtful what the parties intended, and what was the character of the consideration of the transfer, the transfer is always presumed to be a mortgage.<sup>1</sup>

Among the facts or circumstances which tend to prove that the transaction is a mortgage, and not a conditional sale, is the inadequacy of the price paid for the goods,<sup>2</sup>

4 Pick. 349; *Woodson v. Wallace*, 22 Pa. St. 171; *Robinson v. Cropsey*, 2 Edw. Ch. 138; 6 Paige, 480; *Hughes v. Sheaff*, 19 Iowa, 335; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Heath v. Williams*, 80 Ind. 495; *Pennington v. Hanby*, 4 Munf. 140; *Snyder v. Griswold*, 37 Ill. 216; *Montgomery v. Chadwick*, 7 Iowa, 114; *Glover v. Payne*, 19 Wend. 518; *Kearney v. McComb*, 16 N. J. Eq. 189; *McCarron v. Cassidy*, 18 Ark. 34; *Henley v. Hotaling*, 41 Cal. 22; *Cornell v. Hall*, 22 Mich. 377; *Davis v. Stonestreet*, 4 Ind. 191; *Sears v. Dixon*, 33 Cal. 326; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Peterson v. Clark*, 15 Johns. 205; *Haines v. Thompson*, 70 Pa. St. 438; *Watkins v. Gregory*, 6 Blackf. 113; *Rich v. Doane*, 35 Vt. 125; *Weathersby v. Weathersby*, 40 Miss. 469; *Conway v. Alexander*, 7 Cranch, 218; *Trull v. Skinner*, 17 Pick. 216; *Wing v. Cooper*, 37 Vt. 179. But if the debt is an old one, and the intention of the parties is to pay off the debt by the conveyance, the agreement to repurchase will not convert the conveyance into a mortgage, as it would if the conveyance was intended as a security for the conveyance. *Glover v. Payne*, 19 Wend. 518; *Hillhouse v. Dunning*, 7 Conn. 143; *Slowey v. McMurray*, 27 Mo. 113; *Honore v. Hutchings*, 8 Bush, 687; *Magnusson v. Johnson*, 73 Ill. 156; *West v. Hendrix*, 28 Ala. 226; *Ruffler v. Womack*, 36 Tex. 332; *Hickox v. Lowe*, 10 Cal. 197; *Hall v. Saville*, 3 Greene (Iowa), 37; *Pitts v. Cable*, 44 Ill. 103; *O'Neill v. Capelle*, 62 Mo. 202; *Murphy v. Parifay*, 52 Ga. 480; *French v. Sturdivant*, 8 Me. 246.

<sup>1</sup> *Poindexter v. McCannon*, 1 Dev. Eq. 377; *Locke v. Palmer*, 26 Ala. 312; *Folsom v. Fowler*, 15 Ark. 280; *Fowler v. Stoneum*, 11 Tex. 478, 511; *Desloge v. Ranger*, 7 Mo. 327; *Barnes v. Holcombe*, 12 Sm. & M. 306; *Russell v. Southard*, 12 How. 139; *Crane v. Bonnell*, 1 Green Ch. 264; *Bacon v. Brown*, 19 Conn. 34; *Cottrell v. Long*, 20 Ohio, 464; *O'Neill v. Capelle*, 62 Mo. 209; *Heath v. Williams*, 80 Ind. 498; *Swetland v. Swetland*, 3 Mich. 645; *Ward v. Deering*, 4 Mon. 44; *Trucks v. Lindsay*, 18 Iowa, 504; *Scott v. Henry*, 13 Ark. 112; *Turner v. Kerr*, 44 Mo. 429; *Gillis v. Martin*, 2 Dev. Eq. 470; *Turnipseed v. Cunningham*, 16 Ala. 501; *Baughner v. Merryman*, 32 Md. 135; *Eaton v. Green*, 22 Pick. 526.

<sup>2</sup> *Knox v. Black*, 1 A. K. Marsh. 298; *Todd v. Hardie*, 5 Ala. 698; *Hudson v. Isbell*, 5 St. & P. 67; *Fountain v. Bryce*, 12 Rich. Eq. 234; *Quirk v. Rodman*, 5 Duer, 285; *Leblanc v. Bouchereau*, 16 La. Ann. 11; *Cooper v. Brock*, 41 Mich. 488; *Wilson v. Carver*, 4 Hayw. 90; *Wilson v.*



whereas the adequacy of the price tends to prove that it was a conditional sale.<sup>1</sup> These tests are more fully stated elsewhere,<sup>2</sup> and it will not be necessary to repeat them here.

§ 225. A parol chattel mortgage, when valid. — At common law a chattel mortgage was not required to be in writing, any more than a sale of personal property. But by the statute of frauds, certain contracts for the sale of goods, wares and merchandise were under some circumstances required to be in writing<sup>3</sup> and, of course, that provision of the statute would apply to chattel mortgages also, since they are a species of conditional sales. And it is also a statutory requirement in almost every State that to be valid against subsequent purchasers without notice the chattel mortgage must be recorded or filed for recording, and this presupposes a writing. But independently of the negatives of these statutes the parol chattel mortgage is still valid; and notwithstanding the general requirement of registration of the mortgage in order to be valid against third persons, as between the parties to the parol mortgage, it may nevertheless be enforced.<sup>4</sup> Where the possession is transferred, the transaction is generally presumed to be a

Weston, 4 Jones Eq. (N. C.) 349; Elland v. Radford, 7 Ala. 724; Parish v. Gates, 29 Ala. 254.

<sup>1</sup> Scott v. Britton, 2 Yerg. 215.

<sup>2</sup> See ante, § 204.

<sup>3</sup> See ante, Chap. VI.

<sup>4</sup> Morrow v. Turney, 35 Ala. 131; Deshazo v. Lewis, 5 St. & P. 94; Shelburne v. Letsinger, 52 Ala. 96; Thrash v. Bennett, 57 Ala. 156; Stearns v. Gafford, 56 Ala. 544; Glover v. McGillivray, 63 Ala. 508; Ferguson v. Union Furnace Co., 9 Wend. 345; Ceas v. Bramley, 18 Hun, 187; Flory v. Denny, 7 Exch. 581; Loyd v. Currin, 3 Humph. 462; Couchman v. Wright, 8 Neb. 1; Bardwell v. Roberts, 66 Barb. 433; Beeman v. Lawton, 37 Me. 543; Ackley v. Finch, 7 Cow. 290; Bank of Rochester v. Jones, 4 N. Y. 497; Rees v. Coates, 65 Ala. 256; Alabama Warehouse Co. v. Lewis, 56 Ala. 514; Brown v. Coates, 56 Ala. 439; Bickley v. Keenan, 60 Ala. 293; Brooks v. Ruff, 37 Ala. 371; May v. Eastin, 2 Port. 414, 423.

pledge,<sup>1</sup> but a verbal chattel mortgage is as valid without a transfer of the property as is a written mortgage.<sup>2</sup>

A verbal agreement to give a mortgage may be enforced in equity as between the parties;<sup>3</sup> but not against other parties, such as subsequent purchasers or attaching creditors, unless they have notice of the agreement,<sup>4</sup> or the mortgage has been actually executed in pursuance of the agreement.

§ 226. **Form of the mortgage.** — Although, as stated in the preceding paragraph,<sup>5</sup> a parol mortgage is, independently of the statute of frauds, and of the recording law, as valid as a written mortgage, it is the almost universal custom to reduce the mortgage to writing.

The execution of the chattel mortgage is not required to be so exact and formal as that of the mortgage of real estate, and, in fact, no particular words seem to be required to constitute a good mortgage, beyond the requirement that the instrument, which was intended to operate as a mortgage, must contain words sufficient to transfer the title of the goods to the mortgagee.<sup>6</sup> This is because the common-law chattel mortgage was in every respect a conditional sale, a sale upon the condition subsequent, that the debt was not paid when due. Hence all chattel mortgages originally took the form of bills of sale; and although equity has to some extent engrafted on the common-law theory of chattel mortgages the equitable theory of a lien, the form of a conditional bill of sale is still employed everywhere, with very slight variations.

<sup>1</sup> Jones on Pledges, §§ 5, 18; *Beeman v. Lawton*, 37 Me. 543. But see, *contra*, *Bardwell v. Roberts*, 66 Barb. 433.

<sup>2</sup> *Morrow v. Turney*, 35 Ala. 131. See *post*, § 238.

<sup>3</sup> *Morrow v. Turney*, 35 Ala. 131; *Glover v. McGilvray*, 63 Ala. 508; *Couchman v. Wright*, 8 Neb. 1; *Coster v. Bank of Ga.*, 24 Ala. 37, 60.

<sup>4</sup> *Couchman v. Wright*, 8 Neb. 1.

<sup>5</sup> See § 225.

<sup>6</sup> See *ante*, § 222.

In some of the States, statutory forms of chattel mortgages are provided; but they do not supersede, or exclude the use of, the other pre-existing forms. In fact, they differ in the main from the older forms only in a greater simplicity.<sup>1</sup>

In very many of the States, a chattel mortgage is declared invalid against others than the parties to the instrument, unless there is affixed to it an affidavit, the contents of which are prescribed by statute. Generally the affidavit is confined to affirmations of good faith in the execution of the mortgage.<sup>2</sup> But in New Hampshire and Vermont, the form of affidavit, prescribed by statute, contains a statement that the mortgage was given for a debt which is "owing from the mortgagor to the mortgagee;" and in these States, inferentially, a chattel mortgage given to secure the payment of the debt of a third person would not be valid, except as between the immediate parties to the mortgage.<sup>3</sup> The New Hampshire affidavit also precludes the use of the chattel mortgage to secure future advances.<sup>4</sup> But, inasmuch as the purpose of the requirement of an affidavit of this kind was to prevent clandestine bills of sales in fraud of creditors, which could only be possible when the alleged mortgagor retained possession of the mortgaged property, it has been held that the affidavit is not necessary to the validity of the chattel mortgage, if the possession of the property has been given to the mortgagee.<sup>5</sup> And it is also held that the ab-

<sup>1</sup> Such forms are provided by statute in California, Dakota, Maryland. In Georgia, no form is required but the statute states what constitute the essentials of a mortgage. Jones on Chattel Mortgages, § 85.

<sup>2</sup> Such statutes are to be found in Arizona, Idaho, California, Delaware, Maryland, Ohio. Jones Chattel Mortgages, § 86.

<sup>3</sup> Parker v. Morrison, 46 N. H. 280; Sumner v. Dalton, 58 N. H. 295; Belknap v. Wendell, 81 N. H. 92.

<sup>4</sup> Page v. Ordway, 40 N. H. 253.

<sup>5</sup> Gooding v. Riley, 50 N. H. 400; Clark v. Farbell, 57 N. H. 328, overruling *dictum* to contrary in Janvrin v. Fogg, 49 N. H. 340.

sence of the affidavit will not invalidate the mortgage as against a third person interested in the property, who acquires that interest with knowledge that the mortgage had been made in good faith to secure a *bona fide* debt.<sup>1</sup>

In New Hampshire and Vermont it is also required that in the execution of a second or other subsequent mortgage on the same property, notice of the existence of a prior mortgage should be given in the subsequent mortgage. But, inasmuch as this requirement is made for the benefit of the subsequent mortgagee, the subsequent mortgage cannot be invalidated, on account of the absence of this notice from the mortgage, except at the instance of the mortgagee.<sup>2</sup>

§ 227. **Separate execution of the defeasance.** — The defeasance or condition of the mortgage is usually found in the same instrument which serves to transfer the title of the property to the creditor; but this is not necessary. It may be put into a separate instrument executed and delivered by the grantee or mortgagee to the grantor or mortgagor.<sup>3</sup> But in that event the defeasance must either

<sup>1</sup> *Roberts v. Crawford*, 58 N. H. 499; *Sanborn v. Robinson*, 54 N. H. 289.

<sup>2</sup> *Leach v. Kimball*, 84 N. H. 568.

<sup>3</sup> *Carpenter v. Snelling*, 97 Mass. 452; *Potter v. Boston Locomotive Works*, 12 Gray, 154; *Winslow v. Tarbox*, 18 Me. 132; *Davis v. Hubbard*, 38 Ala. 185; *Polhemus v. Trainer*, 80 Cal. 685; *Bartels v. Harris*, 4 Me. 146; *Lobban v. Garnet*, 9 Dana, 389; *Taber v. Hamlin*, 97 Mass. 489; *Brown v. Bement*, 8 Johns. 96; *Barnes v. Holcomb*, 12 Smed. & M. 306; *In re Garney*, 7 Biss. 414; *Bodwell v. Webster*, 13 Pick. 411; *Flint v. Sheldon*, 13 Mass. 443; *Adams v. Stevens*, 49 Me. 362; *French v. Sturdivant*, 8 Greenl. 246; *Dey v. Dunham*, 2 Johns. Ch. 191; *Perkins v. Dibble*, 10 Ohio, 433; *Kent v. Allbrittain*, 5 Miss. 317; *Lane v. Shears*, 1 Wend. 433; *Houser v. Lamont*, 55 Pa. St. 311; *Preschbaker v. Feaman*, 32 Ill. 475; *Clark v. Lyon*, 46 Ga. 203; *Baxter v. Dear*, 24 Tex. 17; *Hill v. Edwards*, 11 Minn. 22; *Robinson v. Willoughby*, 65 N. C. 520; *Archambau v. Green*, 21 Minn. 520; *Edington v. Harper*, 3 J. J. Marsh. 353; *Clark v. Henry*, 2 Cow. 824; *Hammonds v. Hopkins*, 3 Yerg. 525; *Freeman v. Baldwin*, 13 Ala. 246; *Enos v. Sutherland*, 11 Mich. 538; *Marshall v. Stewart*, 17 Ohio, 356; *Crasson v. Swoveland*, 22 Ind. 427; *Copeland v.*

be executed at the same time or subsequently in pursuance of an agreement entered into at the time of the conveyance.<sup>1</sup>

The separate defeasance need not assume any particular form. Any words which clearly describe the fact that the otherwise absolute bill of sale was intended to be a mortgage would be sufficient. And if the defeasance only provides for a redelivery of the property on the payment of a sum of money or on a return of the consideration of the original sale, parol evidence is admissible to show that the transaction was intended to operate as a mortgage.<sup>2</sup>

§ 228. **Parol defeasance, when enforceable.** — It is a cardinal rule of evidence that parol evidence is inadmissible to vary or control the meaning of a written instrument. And in the application of this rule to the law of mortgages, it is held that where the bill of sale is executed on its face apparently absolute, it cannot be made to operate as a mortgage by parol proof of the intention of the grantor to execute a mortgage instead of an absolute bill of sale. This is certainly the legal rule; hence at law a parol defeasance is invalid, if the transfer or sale had been effected by a written instrument.<sup>3</sup> But the instrument must be a bill of sale or other form of transfer of title to the goods, in order that the parol defeasance may be declared invalid. The fact that a bill of parcels or account has been issued, does not

Yoakum, 38 Mo. 349; Sharkey v. Sharkey, 47 Mo. 543; Plato v. Roe, 14 Wis. 453; Stoever v. Stoever, 9 Serg. & R. 434; Baldwin v. Jenkins, 28 Miss. 206; Whitney v. French, 25 Vt. 663; Lund v. Lund, 1 N. H. 89; Warren v. Lovis, 53 Me. 464; Richardson v. Woodbury, 48 Me. 206; Harrison v. Trustees, 12 Mass. 459.

<sup>1</sup> Freeman v. Baldwin, 13 Ala. 246.

<sup>2</sup> Locke v. Palmer, 26 Ala. 312.

<sup>3</sup> Harper v. Ross, 10 Allen, 382; Bryant v. Crosby, 36 Me. 562; Hogel v. Lindell, 10 Mo. 483; Montany v. Rock, 10 Mo. 506; Hartshorn v. Williams, 31 Ala. 149. But see *contra*, Fuller v. Parish, 3 Mich. 211; Reed v. Jewett, 5 Me. 96.

prevent the parol defeasance from being operative, for in that case the sale was itself parol.<sup>1</sup> But in equity, this rule is more or less ignored, in respect to parol defeasances; and parol evidence is very generally held to be admissible to prove that a bill of sale, absolute on its face, was intended to be a mortgage. The authorities are not uniform as to how far, or in what cases, such evidence is admissible. Some have held that in any case parol evidence can be introduced to prove a bill of sale to be a mortgage, thus ignoring completely the application to mortgages of the rule of evidence, just explained,<sup>2</sup> while others either deny the

<sup>1</sup> *Caswell v. Keith*, 12 Gray, 351; *Hazard v. Loring*, 10 Cush. 267.

<sup>2</sup> *Parks v. Hall*, 2 Pick. 206; *Hodges v. Tenn. Marine & Fire Ins. Co.*, 8 N. Y. 416; *Coe v. Cassidy*, 72 N. Y. 133; *Farrell v. Bean*, 10 Md. 217; *Dougherty v. McGalgan*, 6 G. & J. 275; *Stokes v. Hollis*, 43 Ga. 262; *Todd v. Hardig*, 5 Ala. 698; *Watson v. James*, 15 La. An. 386; *Scott v. Henry*, 13 Ark. 112; *Rogers v. Vaughan*, 31 Ark. 62; *Ward v. Deering*, 2 Mon. 9; *Hickman v. Cantrell*, 9 Yerg. 172; *Hurford v. Harned*, 6 Oreg. 362; *Bartel v. Lope*, 6 Oreg. 321; *Love v. Blair*, 72 Ind. 281; *Wilmerding v. Mitchell*, 52 N. J. L. 476; *Wilson v. Carver*, 4 Hayw. 90; *Loyd v. Currin*, 8 Humph. 462; *Carter v. Burris*, 10 Sm. & M. 527; *Humphries v. Bartee*, 10 Sm. & M. 282; *Johnson v. Clark*, 5 Ark. 322; *National Ins. Co. v. Webster*, 88 Ill. 470; *Hudson v. Isbell*, 5 St. & P. 67; *Parish v. Gates*, 29 Ala. 254; *Laeber v. Langhor*, 45 Md. 477; *Ing v. Brown*, 3 Md. Ch. 521; *Michelson v. Fowler*, 27 Hun, 159; *Smith v. Beattie*, 31 N. Y. 542; *Despard v. Walbridge*, 15 N. Y. 374; *Trieber v. Andrews*, 31 Ark. 163; *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 239; *Sprigg v. Bk of Mt. Pleasant*, 14 Pet. 201; *Pierce v. Robinson*, 13 Cal. 116; *Farmer v. Grose*, 42 Cal. 169; *Kuhn v. Rumpp*, 46 Cal. 299; *Klock v. Walter*, 70 Ill. 416; *Conwell v. Evill*, 4 Ind. 677; *Heath v. Williams*, 30 Ind. 495; *Johnson v. Smith*, 39 Iowa, 549; *Zuver v. Lyons*, 40 Iowa, 570; *Richardson v. Woodbury*, 43 Me. 206; *Campbell v. Dearborn*, 109 Mass. 130; *Hassam v. Barrett*, 115 Mass. 24; *McDonough v. Squire*, 111 Mass. 256; *Glass v. Hulbert*, 102 Mass. 24; *Swetland v. Swetland*, 3 Mich. 432; *Belate v. Morrison*, 8 Minn. 87; *Weide v. Gehl*, 21 Minn. 449; *Littlewort v. Davis*, 50 Miss. 403; *Freeman v. Wilson*, 51 Miss. 329; *O'Neill v. Capelle*, 62 Mo. 202; *Slowey v. McMurray*, 27 Mo. 116; *Schade v. Bessenger*, 3 Neb. 140; *Cookes v. Culbertson*, 9 Nev. 109; *Sweet v. Parker*, 22 N. J. Eq. 453; *Cottrell v. Long*, 20 Ohio, 464; *Rhines v. Baird*, 41 Pa. St. 256; *Palmer v. Guthrie*, 76 Pa. St. 441; *Nichols v. Reynolds*, 1 R. I. 30; *Mead v. Randolph*, 8 Tex. 191; *Gibbs v. Penny*, 43 Tex. 560; *Wright v. Bates*, 18 Vt. 348; *Hills v.*

right to admit parol evidence altogether,<sup>1</sup> or limit its admissibility to such cases as fall within the ordinary equitable jurisdiction of fraud, accident or mistake, *i.e.*, where the failure to reduce the defeasance to writing arose out of some fraud, accident or mistake.<sup>2</sup> The courts, which admit parol evidence to prove a parol defeasance in any case, justify this extension of the equitable jurisdiction on the ground that "fraud in the use of the deed (mortgage) is as much a ground for the interposition of equity as fraud in its creation."<sup>3</sup>

The parol defeasance will not only be valid in equity against the parties to the mortgage, but likewise against all others who might subsequently acquire interests in the property with notice of the fact that the sale was made with a defeasance.<sup>4</sup> But it cannot be enforced against a subsequent purchaser for value and without notice of its existence.<sup>5</sup>

Loomis, 42 Vt. 562; Ross v. Norvell, 1 Wash. (Va.) 14; Bird v. Wilkinson, 4 Leigh, 266; Klinck v. Price, 4 W. Va. 4; Rogan v. Walker, 1 Wis. 527; Wilcox v. Bates, 26 Wis. 465; Fuller v. Parrish, 8 Mich. 211; Tyler v. Strang, 21 Barb. 198.

<sup>1</sup> Bassett v. Bassett, 10 N. H. 64; Porter v. Nelson, 4 N. H. 130; Boody v. Davis, 20 N. H. 140. See Osgood v. Thompson, 30 Conn. 27, where the question is pronounced to be a very doubtful one.

<sup>2</sup> Freeman v. Baldwin, 13 Ala. 246; McKinstry v. Conly, 12 Ala. 678; Sewell v. Price, 32 Ala. 97; Whitfield v. Cates, 6 Jones, Eq. 136; Washburn v. Merrills, 1 Day, 139; Brainerd v. Brainerd, 15 Conn. 575; Chaires v. Brady, 19 Fla. 133; Collins v. Tillon, 26 Conn. 368; French v. Burns, 35 Conn. 359. In Georgia, a statute confines the admission of parol evidence to prove a defeasance to cases of fraud. Code of 1873, § 3809; Spence v. Steadman, 49 Ga. 133; Broach v. Barfield, 57 Ga. 601; Biggars v. Bird, 55 Ga. 650.

<sup>3</sup> Jones on Mortgages, § 288. See, also, to same effect, Pierce v. Robinson, 13 Cal. 116; Cornwall v. Evill, 4 Ind. 67; O'Neill v. Capelle, 62 Mo. 202; Wright v. Bates, 13 Vt. 348; Strong v. Stewart, 4 Johns. Ch. 167; Rogan v. Walker, 1 Wis. 52; Moreland v. Bernhart, 44 Tex. 275.

<sup>4</sup> Omaha Book Co. v. Sutherland, 10 Neb. 334.

<sup>5</sup> Morgan v. Shinn, 15 Wall. 105.

§ 229. **Who may make a chattel mortgage — Parties under disability.** — The general rule is, that any owner of personal property, or his duly authorized agent, may execute a valid chattel mortgage, the only exception being those who are under common law disability, viz: infants, insane persons, and married women.<sup>1</sup>

Inasmuch as the infant's and the insane person's contracts are not void, but voidable, the mortgage is enforceable, until the infant determines to avoid it. And he is not prevented from avoiding the mortgage because he has consumed the consideration of the mortgage, and cannot restore the mortgagee to his original position.<sup>2</sup> But if the consideration of the mortgage has not been consumed or disposed of, and can therefore be returned to the mortgagee, the mortgagor cannot avoid the mortgage without returning the consideration. Thus, if the property mortgaged had been bought from the mortgagee, and the mortgage had been given to secure the purchase-money, the mortgage property would have to be returned, before the mortgage could be avoided.<sup>3</sup>

Inasmuch as the general subject of parties is treated elsewhere, it is not considered necessary to dwell upon it here in its application to chattel mortgages.<sup>4</sup>

§ 230. **What may be mortgaged — Mortgage of fixtures.** — It may be stated that anything which can be the

<sup>1</sup> See *ante*, Chapter, II., for a general discussion of disability to become parties to a sale.

<sup>2</sup> *Miller v. Smith*, 26 Minn. 248; *Corey v. Burton*, 32 Mich. 36; *Green v. Green*, 7 Hun, 492; *Riley v. Mallory*, 33 Conn. 206; *Chapin v. Shafer*, 49 N. Y. 407; *State v. Plaisted*, 48 N. H. 413.

<sup>3</sup> *Heath v. West*, 28 N. H. 101; *Curtiss v. McDougall*, 26 Ohio St. 66; *Corey v. Burton*, 32 Mich. 30; *Cogley v. Cushman*, 16 Minn. 397; *Bartholomew v. Finnemore*, 17 Barb. 428; *Carr v. Clough*, 26 N. H. 280; *Knaggs v. Green*, 48 Wis. 601; *Roberts v. Wiggins*, 1 N. H. 73; *Skinner v. Maxwell*, 66 N. C. 45.

<sup>4</sup> See *ante*, Chapter II.



subject of an absolute sale<sup>1</sup> may be mortgaged.<sup>2</sup> Every species of property, tangible or intangible, may be the subject of a mortgage, choses in action, as well as property in possession.<sup>3</sup> So, also, an executory right which may become perfect by execution of the contract may be mortgaged in equity.<sup>4</sup>

Of the same character is the interest of the vendee in the subject of a conditional sale. Although defeasible, if the condition is subsequent, the vendee's interest may be mortgaged if he is in possession of the goods,<sup>5</sup> subject, of course, to the possibility of forfeiture on account of the breach of the condition by the conditional vendee and mortgagor.<sup>6</sup> And it would seem that the conditional vendee would have a mortgageable interest, if he is in possession of the goods, although the agreement between vendor and vendee is that the title does not pass with the possession to the vendee until the price is paid.<sup>7</sup> But, in any case, the conditional vendee has nothing which he can mortgage, if he has not taken possession of the property.<sup>8</sup>

On the other hand, if the sale is made upon condition that the title shall not pass until the price is paid and the possession is given to the vendee, the vendor so far retains the title as that he may mortgage the property, to the exclusion of the rights of the conditional vendee. The mortgagee

<sup>1</sup> See *ante*, Chapter V.

<sup>2</sup> *Dorsey v. Hall*, 7 Neb. 460.

<sup>3</sup> *Pindell v. Grooms*, 18 B. Mon. 501; *Jencks v. Smith*, 1 N. Y. 90.

<sup>4</sup> *Forman v. Proctor*, 9 B. Mon. 124; *Currier v. Knapp*, 117 Mass. 324; *Harrington v. King*, 121 Mass. 269; *Chase v. Ingalls*, 122 Mass. 381.

<sup>5</sup> *Crompton v. Pratt*, 105 Mass. 255; *Everett v. Hall*, 67 Me. 497; *Greenaway v. Fuller*, 47 Mich. 557; *Day v. Bassett*, 102 Mass. 445.

<sup>6</sup> *Holman v. Lock*, 51 Ala. 287.

<sup>7</sup> *Blackwell v. Walker*, 8 Fed. Rep. 419; *Benner v. Puffer*, 114 Mass. 376; *Hart v. Carpenter*, 24 Conn. 427; *Thorpe v. Fowler*, 57 Iowa, 541; *Ballard v. Burgett*, 40 N. Y. 314; *Coggill v. Hartford, &c., R. R. Co.*, 3 Gray, 547.

<sup>8</sup> *Doyle v. Mizner*, 40 Mich. 160.

would acquire a better and superior title to the goods than that of the vendee.<sup>1</sup> And the owner of a chattel can make a mortgage of goods, as long as he has a general property in the goods, although some one else has acquired possession under a special property therein, such as a pledge or lien;<sup>2</sup> and whether the chattel mortgage is treated as a conditional sale or as a lien, the mortgagor still has sufficient interest in the property, as that it may be mortgaged again, subject, of course, to the first mortgage.<sup>3</sup>

It is also unnecessary that the mortgagor should have an absolute property in the thing. In the cultivation of land on shares, where the agreement is that the owner of the land and occupant shall become tenants in common of the crop, the occupant may mortgage his undivided share; but if the parties are not tenants in common of the crop, but the land-owner is absolute owner of the crop, and the occupant is only entitled to a share of the crop, on division, as compensation for his services, he has no interest in the crop which he can mortgage.<sup>4</sup> Any tenant in common may mortgage his undivided share in the property, subject to the right of partition by the other co-tenants,<sup>5</sup> and if the co-tenants are partners, the power of one to mortgage his interest is not thereby restricted, except that the mortgagee of the partner will take his undivided interest in the partnership, subject to the superior equity in favor of the partnership debts.<sup>6</sup> But in every case of the mortgage of an undivided interest in a joint property, the mortgagee

<sup>1</sup> *Everett v. Hall*, 67 Me. 497.

<sup>2</sup> *M'Calla v. Bullock*, 2 Bibb, 288; *Pindell v. Grooms*, 18 B. Mon. 501.

<sup>3</sup> *Smith v. Coolbaugh*, 21 Wis. 427.

<sup>4</sup> *Powder v. Rhea*, 32 Ark. 485; *Leland v. Sprague*, 28 Vt. 746.

<sup>5</sup> *Smith v. Rice*, 56 Ala. 417; *Gaar v. Hurd*, 92 Ill. 315; *Shuart v. Taylor*, 7 How. Pr. 251.

<sup>6</sup> *Thompson v. Spittle*, 102 Mass. 207; *Nicholl v. Stewart*, 36 Ark. 612; *Monroe v. Hamilton*, 60 Ala. 226; *Smith v. Andrews*, 49 Ill. 28; *Moline Wagon Co. v. Rummell*, 2 McCrary, 301.

does not acquire any better right to the possession of the property, than the mortgagor had.<sup>1</sup>

Although it has been held that one in possession of goods, to which he has no title whatever,—except the title which he acquires by possession against all the world but the true owner—has nothing which he can mortgage;<sup>2</sup> yet, it would appear the better rule that, except as against the true owner, he did have sufficient title to the goods by his possession of them, to enable him to make a mortgage of them. At any rate, when the mortgagor has acquired the possession with the consent of the owner, and his only offense is the violation of the limitations imposed by the owner on his right to possession, or where the possession was obtained by fraud, the innocent mortgagee is held to acquire a perfect title to the goods under the mortgage, not only against the mortgagor, but also against the true owner.<sup>3</sup> It would seem to be a logical inference from this proposition that the possessor of chattels will in any case have sufficient title to mortgage them, subject, of course, to the superior rights of the true owner.

As long as fixtures remain removable by the tenant or other persons who annexed them to the land, they may be the subject of a chattel mortgage, notwithstanding their connection with the land.<sup>4</sup> While the presumption is, when things personal in their nature are annexed to the land, whether by the general owner or by a stranger, that they will become a permanent part of the realty, yet in any such case, the personal character of the thing may be retained in law, notwithstanding its annexation to the soil, by

<sup>1</sup> *Smith v. Rice*, 56 Ala. 417; *Tarbel v. Bradley*, 7 Abb. N. C. 273; *Shuart v. Taylor*, 7 How. Pr. 251; *Gaar v. Hurd*, 92 Ill 315.

<sup>2</sup> *Glaze v. Blake*, 56 Ala. 379; *Stanley v. Gaylord*, 1 Cush. 536; *Waters v. Cox*, 2 Bradw. 129.

<sup>3</sup> *Malcolm v. Loveridge*, 13 Barb. 372.

<sup>4</sup> *Smith v. Benson*, 1 Hill, 176; *Denham v. Sankey*, 38 Iowa, 269; *Goodenow v. Allen*, 68 Me. 308; *Lamphere v. Lowe*, 3 Neb. 131, 134.

the agreement of the parties.<sup>1</sup> And if, in the purchase of the thing a chattel mortgage is given for the purchase-money, as between the parties to the mortgage and all others having notice of the mortgage the thing remains personal property, notwithstanding its subsequent annexation to the soil, and can therefore be sold under the foreclosure of the mortgage.<sup>2</sup> But such a chattel mortgage could not be enforced against a subsequent purchaser of the land to which the thing was annexed, who bought the land without notice of the chattel mortgage over the fixture.<sup>3</sup> And this also seems to be the rule, where the mortgage of realty is prior to the annexation of the thing, and the owner of the land subsequently attempts to make a mortgage of the chattel.<sup>4</sup> And this is certainly true, where the chattel mortgage is not given for the purchase money, or is given after the thing has been annexed to the land.<sup>5</sup>

But where the subsequent purchaser or mortgagee of the realty takes the deed with knowledge of the existence of the chattel mortgage, the chattel mortgage will be a superior lien, and can be enforced against the subsequent purchaser

<sup>1</sup> *Smith v. Waggoner*, 50 Wis. 155; *Godard v. Gould*, 14 Barb. 662; *Shell v. Haywood*, 16 Pa. St. 523; *Ford v. Cobb*, 20 N. Y. 344.

<sup>2</sup> *Corcoran v. Webster*, 50 Wis. 125; *Ford v. Cobb*, 20 N. Y. 344; *Kinsey v. Bailey*, 9 Hun, 452; *Sisson v. Hubbard*, 10 Hun, 420; *Eaves v. Estes*, 10 Kan. 314; *Western Union Tel. Co. v. Burlington & c. R. R. Co.*, 11 Fed. Rep. 1; *Coman v. Lakey*, 80 N. Y. 345; *Heryford v. Davis*, 102 U. S. 235. It is not necessary to insert into the chattel mortgage the express stipulation that the thing mortgaged shall remain personal in its nature, as was done in *Tift v. Horton*, 53 N. Y. 377.

<sup>3</sup> *Voorhees v. McGinnis*, 48 N. Y. 278, 287; *Pierce v. George*, 108 Mass. 78; *Coman v. Lakey*, 80 N. Y. 345; *Smith v. Waggoner*, 50 Wis. 155; *Keeler v. Keeler*, 31 N. Y. Eq. 181.

<sup>4</sup> *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 N. H. 66; *Burnside v. Twitchell*, 43 N. H. 390.

<sup>5</sup> *Smith v. Waggoner*, 50 Wis. 155; *Frankland v. Moulton*, 5 Wis. 1.

or mortgagee of the realty.<sup>1</sup> But if the property, personal in its nature, has been so permanently and securely annexed to the soil, as that the thing cannot be extracted without serious injury to the freehold, such as bricks, mortar and lumber, which have been used in the construction of a building, it is generally held that the chattel mortgage of such things cannot be enforced against a subsequent purchaser or mortgagee of the land, although such purchaser or mortgagee may have known of the chattel mortgage.<sup>2</sup> But if the fixture is expressly excepted from the mortgage of the realty, as a matter of course, the mortgagee can make no claim to the fixture as against the chattel mortgagee.<sup>3</sup>

It has been a much-mooted question, whether the filing of the chattel mortgage of a fixture would be sufficient constructive notice to a subsequent purchaser or mortgagee of the realty in order to give priority to the chattel mortgage. There are some cases which maintain the affirmative;<sup>4</sup> but the weight of authority is against that view, and the better opinion is that the recording of the chattel mortgage is constructive notice only to subsequent purchasers and incumbrancers of the fixture, and that the purchaser or mortgagee of the realty will only lose his priority over the mortgage of the fixture by having actual knowledge of the latter.<sup>5</sup>

<sup>1</sup> *Simmons v. Pierce*, 16 Ohio St. 215; *Tift v. Horton*, 53 N. Y. 377; *Tibbets v. Moore*, 23 Cal. 208; *Eaves v. Estes*, 10 Kan. 314; *First Nat. Bank v. Elmore*, 52 Iowa, 541; *Sisson v. Hubbard*, 10 Hun, 420.

<sup>2</sup> *Voorhees v. McGinnis*, 48 N. Y. 273, 287; *Richardson v. Copeland*, 6 Gray, 536; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Ford v. Cobb*, 20 N. Y. 344, 351.

<sup>3</sup> *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302.

<sup>4</sup> *Ford v. Cobb*, 20 N. Y. 344; *Sowden v. Craig*, 26 Iowa, 156.

<sup>5</sup> *Richardson v. Copeland*, 6 Gray, 536; *Brighoff v. Munzenmaier*, 20 Iowa, 513; *Sowden v. Craig*, 26 Iowa, 165, dissenting opinion of Dillon, C. J.; *Fortman v. Goepper*, 14 Ohio St. 553; *Brennan v. Whitaker*, 15 Ohio St. 446.

The mortgage of an estate for years, which is of so short a duration that it does not come within the recording laws relating to the conveyances of real property, would be held to be a chattel mortgage, and should be recorded as a chattel mortgage.<sup>1</sup> But the general rule is that such a mortgage would be considered an interest in realty.

In a few of the States, it is provided by statute what can be the subject of a chattel mortgage, and wherever there is such a statutory enumeration, there is an implied exclusion of all other species of property. Under such a statute, a chattel mortgage is held to be invalid if it covers some article not included in the statute, or if it is not executed in compliance with the statute.<sup>2</sup> But it seems to be the better opinion that the chattel mortgage, which does not come within the provisions of the statute, is not absolutely invalid; that its validity is determined according to the rules of the common law, but that the special provisions of the statute for the protection of the mortgagee will not apply to such a mortgage.<sup>3</sup> Such statutes are to be found in Arizona, California, Connecticut, Idaho, Michigan and New Hampshire.

§ 231. Can a chattel mortgage cover after-acquired property? — It is said to be “a common learning in the law, that a man cannot grant or charge property which he hath not.”<sup>4</sup> And inasmuch as the common law, and the still prevalent, theory is that the chattel mortgage is a grant *in presenti* upon condition, there is no escape from the conclusion that at law a chattel mortgage cannot as a mort-

<sup>1</sup> Bismarck Building & Loan Association v. Bolster, 92 Pa. St. 123; Jones on Mortgages, § 471.

<sup>2</sup> Gaylor v. Harding, 37 Conn. 503; Stringer v. Davis, 30 Cal. 313.

<sup>3</sup> Wildman v. Rodenaker, 20 Cal. 615; Gassner v. Patterson, 23 Cal. 299. See Howe v. Keeler, 27 Conn. 538.

<sup>4</sup> Perkins, § 65.

gage be made to cover after-acquired goods.<sup>1</sup> Not even where the subject of the mortgage is a stock of goods, and the agreement of the parties is that the mortgagor shall retain the stock, sell the goods at retail in the course of trade, and keep up the stock by purchasing other goods of like kind.<sup>2</sup> The only exception to this general rule which the common law recognized was in relation to those things which were in the potential, but not actual, possession of the party who made the grant or mortgage, such as the increase or growths from the property of the grantor or mortgagor. For example, it has been held possible, at common law, to make a mortgage of a growing crop, where one owned the land, or had a possessory interest therein,<sup>3</sup> and even of a

<sup>1</sup> *Jones v. Richardson*, 10 Met. 481; *Chesley v. Josselyn*, 7 Gray, 489; *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.*, 27 Hun, 89; *Otis v. Sill*, 8 Barb. 102; *Griffith v. Douglass*, 73 Me. 532; *Hunt v. Bullock*, 23 Ill. 320; *Wilson v. Wilson*, 37 Md. 1; *Rose v. Bevan*, 10 Md. 466; *Lettourno v. Ringgold*, 3 Cranch C. C. 108; *Looker v. Peckwell*, 38 N. J. L. 253; *Comstock v. Scales*, 7 Wis. 159; *Williams v. Briggs*, 11 R. I. 476; *Cook v. Corthell*, 11 R. I. 482; *Parker v. Jacobs*, 14 S. C. 112; *Chapman v. Weimer*, 4 Ohio St. 481; *Hunter v. Bosworth*, 43 Wis. 583; *Pierce v. Emery*, 32 N. H. 484, 505; *Wagner v. Watts*, 2 Cranch C. C. 169; *Hamilton v. Rogers*, 8 Md. 301; *Roy v. Goings*, 6 Bradw. 162; *s. c.* 96 Ill. 361; *Head v. Goodwin*, 37 Me. 181; *Chapin v. Cram*, 40 Me. 561; *Gardner v. McEwen*, 19 N. Y. 123; *Bonsey v. Amee*, 8 Pick. 236; *Codman v. Freeman*, 3 Cush. 306.

<sup>2</sup> *Williams v. Briggs*, 11 R. I. 476; *Rose v. Bevan*, 10 Md. 461; *Moody v. Wright*, 13 Met. 17; *Rhines v. Phelps*, 3 Gilm. 455; *Chapin v. Cram*, 40 Me. 561; *St. Louis Drug Co. v. Dart*, 7 Mo. App. 590; *Sharpe v. Pearce*, 74 N. C. 600; *Barnard v. Eaton*, 2 Cush. 294; *Jones v. Richardson*, 10 Met. 481; *Hamilton v. Rogers*, 8 Md. 301; *Wright v. Bircher*, 5 Mo. App. 322; *Griffith v. Douglass*, 73 Me. 532; *Parker v. Jacobs*, 14 S. C. 112. In Georgia, it is provided by statute that such a mortgage will be efficient to cover the goods added to the stock by way of replenishing the stock. *Ga. Code of 1882*, § 1954. See, also, in construction of this statute, *Chisholm v. Chittenden*, 45 Ga. 213; *Anderson v. Howard*, 49 Ga. 313; *Goodrich v. Williams*, 50 Ga. 425; *Johnson v. Patterson*, 2 Woods, 443.

<sup>3</sup> *Cayce v. Stovall*, 50 Miss. 396; *Thrash v. Bennett*, 57 Ala. 156; *Jones v. Webster*, 48 Ala. 109; *Stephens v. Tucker*, 55 Ga. 543; *s. c.* 58 Ga. 391; *McGee v. Fitzer*, 37 Tex. 27; *Moore v. Byrum*, 10 S. C. 452; *Cook v. Steel*, 42 Tex. 53; *Butler v. Hill*, 1 Baxt. 375; *Stearns v. Gafford*, 56 Ala.

crop not yet planted, if it is to be planted or grown during the continuance of the present possessory interest in the land,<sup>1</sup> although the authorities are at variance on this latter proposition, many of the cases refusing to apply the doctrine of potential existence to an unplanted crop, so as to make a mortgage of the crop valid at law.<sup>2</sup> It is also held, under the same doctrine of potential existence, that a mortgage of all the crops to be grown on the land during the continuance of the lease, under which the mortgagor holds possession, is valid.<sup>3</sup> Although growing trees, fruit and

544; *White v. Thomas*, 52 Miss. 49. And if the means of identification are provided in the description of the mortgaged property, the mortgage may be made to cover only a part of the growing crop. *Stephens v. Tucker*, 55 Ga. 548. But if the description does not point out which portion is covered by the mortgage, the mortgage is only an executory agreement, until the portion of crop covered by it has been set apart, or otherwise definitely ascertained. *Prentice v. Nutter*, 25 Minn. 485; *Thurman v. Jenkins*, 2 Baxt. 426; *Williamson v. Steele*, 3 Lea, 527.

<sup>1</sup> *Van Hoozer v. Cory*, 84 Barb. 9, 12; *Wood v. Lester*, 29 Barb. 145; *Robinson v. Ezzell*, 72 N. C. 281; *Watkins v. Wyatt*, 9 Baxt. 250; *Conderman v. Smith*, 41 Barb. 404; *Argues v. Wasson*, 51 Cal. 620; *Cotten v. Willoughby*, 88 N. C. 75; *Womble v. Leach*, 88 N. C. 84; *Harris v. Jones*, 88 N. C. 317. In New Mexico, the mortgage of a growing crop is declared to be void and of no effect, and in California, it is provided by statute that such mortgages shall be enforced even after severance of the crop from the soil. *Jones on Chattel Mortgages*, § 148.

<sup>2</sup> *McCaffrey v. Woodin*, 65 N. Y. 459; *Stowell v. Bair*, 5 Bradw. 104; *Cressey v. Sabre*, 17 Hun, 120; *Elmore v. Simon*, 67 Ala. 526; *Millman v. Neher*, 20 Barb. 37; *Bank v. Crary*, 1 Barb. 542; *Rees v. Coats*, 56 Ala. 439; *Hutchinson v. Ford*, 9 Bush, 318; *Tomlinson v. Greenfield*, 81 Ark. 557; *Apperson v. Moore*, 30 Ark. 56. In Arkansas it is now provided by statute that such a mortgage shall be valid at law. *Sambeth v. Ponder*, 33 Ark. 707. But in order that an instrument may operate as a mortgage of an unplanted crop, it must contain words of grant, and something more than an agreement that the creditor shall have the right to enter and take possession of the crop when grown. *Butterfield v. Baker*, 5 Pick. 522; *Munsell v. Carew*, 2 Cush. 50; *Millman v. Neher*, 20 Barb. 37; *Buskirk v. Cleveland*, 41 Barb. 610.

<sup>3</sup> *Petch v. Tutin*, 15 M. & W. 110; 15 L. J. Exch. 280; *Argues v. Wasson*, 51 Cal. 620; *Everman v. Robb*, 52 Miss. 653; *Booker v. Jones*, 55 Ala. 266; *Thrash v. Bennett*, 57 Ala. 156; *Adams v. Tanner*, 5 Ala. 740; *Mauldin v. Armistead*, 14 Ala. 702; *s. c.* 18 Ala. 500; *Headrick v. Brat-*



grass, are generally considered a part of the realty, and as such cannot be the subject of a chattel mortgage; <sup>1</sup> if a mortgage is given of growing trees or grasses, to be cut and severed from the soil, <sup>2</sup> and more especially where it is given by one who does not own the land, but who has purchased the same from the owner of the land, <sup>3</sup> it is a good chattel mortgage under the doctrine of potential existence. It is further held that a valid chattel mortgage may be made at common law of the future increase of stock which the mortgagor then owned, <sup>4</sup> and of the future profits or income from the use of the mortgagor's steamboat. <sup>5</sup> And so, also, may a sailor mortgage his share in the profits of a whaling voyage, which is actually begun or projected. <sup>6</sup> But a mortgage could not be made at law of the fish which may be caught on a projected voyage, for the fisherman has no po-

tain, 63 Ind. 488; *Pennington v. Jones*, 57 Iowa, 37; *Fejavary v. Broesch*, 52 Iowa, 88; *Robinson v. Kruse*, 29 Ark. 575; *Robinson v. Mauldin*, 11 Ala. 977; *Stearns v. Gafford*, 56 Ala. 544; *Brown v. Coats*, 56 Ala. 489; *Jones v. Webster*, 48 Ala. 109; *Sillers v. Lester*, 48 Miss. 513; *Quiriauque v. Dennis*, 24 Cal. 154; *Smith v. Atkins*, 18 Vt. 461, 465; *Harris v. Frank*, 52 Miss. 155; *Bellows v. Wells*, 86 Vt. 599; *Lewis v. Lyman*, 22 Pick. 437; *Moulton v. Robinson*, 27 N. H. 550.

<sup>1</sup> *Crosby v. Wadsworth*, 6 East, 602; *Scorell v. Borall*, 1 You. & Jer. 396; *Rodwell v. Phillips*, 9 M. & W. 505; *Wintermute v. Light*, 46 Barb. 278; *Green v. Armstrong*, 1 Den. 550; *Teal v. Anty*, 2 B. & B. 99; *s. c.* 4 J. B. Moo. 542; *Carrington v. Roots*, 2 M. & W. 248; *Bank of Lansingburg v. Crary*, 1 Barb. 542, 547; *Cudworth v. Scott*, 41 N. H. 456, 463.

<sup>2</sup> *Cook v. Stearns*, 11 Mass. 533; *Douglas v. Shumway*, 13 Gray, 498; *Cudworth v. Scott*, 41 N. H. 462; *Wood v. Lester*, 29 Barb. 145; *Erskine v. Plummer*, 7 Me. 447; *Nelson v. Nelson*, 6 Gray, 385.

<sup>3</sup> *Clafin v. Carpenter*, 4 Met. 580; *Smith v. Jencks*, 1 Denio, 580; *s. c.* 1 N. Y. 90; *Green v. Armstrong*, 1 Denio, 550. See *Sheldon v. Conner*, 48 Me. 584.

<sup>4</sup> *Grantham v. Hawley*, Hob. 132; *Sawyer v. Gerrish*, 70 Me. 354; *Moore v. Byrum*, 10 S. C. 452; *Farrar v. Smith*, 64 Me. 74; *Oakes v. Moore*, 24 Me. 214, 220.

<sup>5</sup> *Stewart v. Fry*, 8 Ala. 573.

<sup>6</sup> *Gardner v. Hoeg*, 18 Pick. 168; *Tripp v. Brownell*, 12 Cush. 376; *Low v. Pew*, 108 Mass. 347. But not the profits of a voyage not yet projected. *Cooper v. Douglass*, 44 Barb. 409.

tential interest in the fish which he may catch in the future, although he may mortgage the earnings to be derived from the voyage.<sup>1</sup> It is also impossible to mortgage a mere possibility or expectancy of acquiring property.<sup>2</sup>

It is, also, another apparent exception to the general rule, which prohibits at law the mortgage of goods not yet acquired, that if personal property become annexed to other property, which is itself covered by a mortgage, that the thing so annexed becomes a part of the mortgaged property, and as such is covered by the mortgage. This happens often, where a mortgage is given of an uncompleted article.<sup>3</sup> And on the same principle, it is held that a mortgage of domestic animals covers their increase.<sup>4</sup> And so likewise, with the growth of cuttings from mortgaged plants.<sup>5</sup>

**§ 232. How far mortgage of after acquired property is invalid — The mortgage in equity. —** But it must be observed, in the foregoing discussion, that the mortgage of

<sup>1</sup> *Robinson v. McDonnell*, 5 Mau. & Sel. 228; *Low v. Pew*, 108 Mass. 347. But see *Jones v. Webster*, 48 Ala. 109; *Curtis v. Auber*, 1 J. & W. 526.

<sup>2</sup> *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

<sup>3</sup> *Reid v. Fairbanks*, 1 C. L. R. 787; *Harding v. Coburn*, 12 Met. 333; *Jenckes v. Goffe*, 1 R. I. 511; *Ex parte Ames*, 1 Lowell, 561; *Perry v. Pettingill*, 33 N. H. 433; *Putnam v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295; *Comins v. Newton*, 10 Allen, 518; *The Canada*, 7 Fed. Rep. 248; *Southworth v. Ashland*, 3 Sandf. 448. And see *Dunning v. Stearns*, 9 Barb. 630; *Frost v. Willard*, 9 Barb. 440; *Sumner v. Hamlet*, 12 Pick. 76; *Pulcifer v. Page*, 32 Me. 404; *Glover v. Austin*, 6 Pick. 209; *Gregg v. Sanford*, 24 Ill. 17.

<sup>4</sup> *Forman v. Proctor*, 9 B. Mon. 124; *M'Carty v. Blevins*, 5 Yerg. 195; *Gundy v. Biteler*, 6 Bradw. 510; *Nicholson v. Temple*, 4 P. & B. N. B. 248; *Hughes v. Graves*, 1 Litt. 317; *Tonville v. Casey*, 1 Murphy (N. C.) 389; *Evans v. Meniken*, 8 Gill & J. 39. But this would be the case, in the absence of an express stipulation that the increase shall be included, only as long as it is necessary for the young to follow the dam for nurture. *Winter v. Landphere*, 42 Iowa, 471. See *Thorpe v. Cowley*, 55 Iowa, 408; *Kellogg v. Lovely*, 46 Mich. 181; *Fowler v. Merrill*, 11 How. 375.

<sup>5</sup> *Bryant v. Pennell*, 61 Me. 108.

after-acquired goods is held to be invalid only as against subsequent purchasers and attaching creditors. Such a mortgage is good as between the parties to the mortgage, the mortgagor being estopped from denying its validity as to the after-acquired goods,<sup>1</sup> and the mortgage is also held to be valid against a purchaser who buys with notice of the mortgage, on the ground that since the mortgagor is bound, the purchaser with notice is not misled and therefore gets no better title.<sup>2</sup> For the same reason, viz., that of notice, if the mortgagee has taken possession of the after-acquired property under the mortgage, the mortgage will be valid against subsequent purchasers and attaching creditors.<sup>3</sup> And the same result is attained, whether the mortgagor voluntarily puts the mortgagee into possession, or the mortgagee acquires possession against the will of the mortgagor, but in pursuance of an executory agreement contained in the mortgage that he shall take possession on default of payment.<sup>4</sup> Another form of validating the

<sup>1</sup> *Allen v. Goodnow*, 71 Me. 420, 425; *Fejavary v. Broesch*, 52 Iowa, 88.

<sup>2</sup> *Robson v. Michigan Central R. R. Co.*, 37 Mich. 70; *People v. Bristol*, 35 Mich. 28; *American Cigar Co. v. Foster*, 36 Mich. 368; *Cadwell v. Pray*, 41 Mich. 307; *Wood v. Lester*, 29 Barb. 145; *McGee v. Fitzer*, 37 Tex. 27.

<sup>3</sup> *Rowley v. Rice*, 11 Met. 333; *Chase v. Denny*, 130 Mass. 566; *Butterfield v. Baker*, 5 Pick. 522; *Carrington v. Smith*, 8 Pick. 419; *Leland v. Colver*, 34 Mich. 418; *McCaffrey v. Woodin*, 65 N. Y. 459; *Kennedy v. Not. Union Bank*, 23 Hun, 494; *Gregg v. Sanford*, 24 Ill. 17; *Roy v. Goings*, 6 Bradw. 162; *Chapman v. Weiner*, 4 Ohio St. 481; *Thompson v. Foerstel*, 10 Mo. App. 290; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Morrow v. Reed*, 30 Wis. 81; *Booker v. Jones*, 55 Ala. 266; *Stern v. Simpson*, 62 Ala. 194; *Moore v. Byrum*, 10 S. C. 452, 462; *Oliver v. Town*, 28 Wis. 328; *Chynoweth v. Tenney*, 10 Wis. 397; *Cameron v. Marvin*, 26 Kan. 612, 629; *Brown v. Webb*, 20 Ohio, 389; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabee*, 25 Ill. 257; *Brown v. Platt*, 3 Bosw. 324; *Cook v. Cortrell*, 11 R. I. 482; *Williams v. Briggs*, 11 R. I. 476; *Griffith v. Douglass*, 73 Me. 532; *Mitchell v. Black*, 6 Gray, 100; *Moody v. Wright*, 13 Met. 32.

<sup>4</sup> *Thompson v. Foerstel*, 10 Mo. App. 290; *Chapman v. Welmer*, 4 Ohio St. 481. And the attempted revocation of a license to enter into

mortgage of after-acquired goods is to indorse on the mortgage, after the goods have been acquired some sort of satisfaction of the mortgage.<sup>1</sup>

Where the after-acquired goods have been mixed up with the goods which were in possession when the mortgage was executed, the burden is on the mortgagee to prove which of the goods were the property of the mortgagor at the date of the mortgage.<sup>2</sup>

But whatever doubt and confusion may prevail as to the validity at law of mortgages which cover after-acquired goods, since equity treats the chattel mortgage as a lien, instead of a grant, the mortgage will be enforced in a court of equity over the after-acquired property, "attaching in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice."<sup>3</sup>

possession will not avail to prevent the enforcement of the mortgage. *Wood v. Leadbitter*, 13 M. & W. 838; *Wood v. Manly*, 11 Ad. & E. 34; *McCaffrey v. Woodin*, 65 N. Y. 459. But see, *contra*, *Chynoweth v. Tenney*, 10 Wis. 397; *Single v. Phelps*, 20 Wis. 398.

<sup>1</sup> *Brown v. Thompson*, 69 Me. 372. See, also, *Griffith v. Douglass*, 73 Me. 532.

<sup>2</sup> *Hamilton v. Rogers*, 8 Md. 301. But see *Mowry v. White*, 21 Wis. 417; *Dunning v. Stearns*, 9 Barb. 630; *Simmons v. Jenkins*, 76 Ill. 479.

<sup>3</sup> *Story, J.*, in *Mitchell v. Winslow*, 2 Story C. C. 634; *Butt v. Ellett*, 19 Wall. 544; s. c. 1 Woods C. C. 214; *Nat. Shoe & Leather Bank v. Small*, 7 Fed. Rep. 887; *Apperson v. Moore*, 30 Ark. 56; *Parker v. Jacobs*, 14 S. C. 112; *Floyd v. Morrow*, 26 Ala. 353; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Fejavary v. Broesch*, 52 Iowa, 88; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Cook v. Corthell*, 11 R. I. 482; *Groton Mfg. Co. v. Gardiner*, 11 R. I. 626; *Thompson v. Foerstel*, 10 Mo. App. 290, 299; *Page v. Gardner*, 20 Mo. 507; *Pennock v. Coe*, 23 How. 117; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Gevers v. Wright*, 18 N. J. Eq. 330; *McCaffrey v. Woodin*, 65 N. Y. 459; *First Nat. Bank v. Turnbull*, 32 Gratt. 695; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580; *Ross v. Wilson*, 7 Bush, 29; *Zaring v. Cox*, 78 Ky. 527; *Borst v. Nalle*, 28 Gratt. 423; *Levy v. Welsh*, 2 Edw. Ch. 438; *Williamson v. N. J. Southern R. R. Co.*, 29 N. J. Eq. 311; *Wright v. Bircher*, 72 Mo. 179; *Griffith v. Douglas*, 73 Me. 532; *Williams v. Winsor*, 12 R. I. 9; *Sillers v. Lester*, 48 Miss. 513; *Stephens v.*

But, in order that the chattel mortgage may, in any case, at law or in equity, cover after-acquired property, the mortgage must show that it was intended to cover the after-acquired property;<sup>1</sup> and the mortgage must describe these goods so that they may be identified by the description.<sup>2</sup>

The authorities do not agree as to the effect of recording a chattel mortgage which covers after-acquired property, as to charging subsequent purchasers with constructive notice of the lien on the after-acquired property. Some of the cases hold that the recording does not serve to give constructive notice,<sup>3</sup> not even when the mortgage has become valid at law by a reduction of the after-acquired goods to the possession of the mortgagee.<sup>4</sup> But there are other courts, which maintain that the record gives constructive notice of the contents of the mortgage, although it is only operative in equity.<sup>5</sup>

§ 233. Description of property. — It is the requirement of every sort of conveyance or grant that the property or in-

Pence, 56 Iowa, 257; *Gregg v. Sanford*, 24 Ill. 17; *Robinson v. Mauldin*, 11 Ala. 977; *Schulenburg v. Martin*, 1 McCrary, 348; *Brett v. Carter*, 2 Low. 458; *Beall v. White*, 94 U. S. 382. But see *contra* *Moody v. Wright*, 13 Met. 30; *Barnard v. Eaton*, 2 Cush. 294; *Chynoweth v. Tenney*, 10 Wis. 397; *Hunter v. Bostworth*, 43 Wis. 583.

<sup>1</sup> *Phillips v. Both*, 58 Iowa (1882), 499.

<sup>2</sup> *Belding v. Read*, 3 Hurl. & C. 955; *Lazarus v. Andrade*, 5 C. P. D. 318. See *post*, § 238, for a general discussion of the requisites in description.

<sup>3</sup> *Jones v. Richardson*, 10 Met. 498; *Frost v. Willard*, 9 Barb. 440; *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.*, 27 Hun, 89; *Jones v. Chamberlin*, 5 Heisk. 210; *Single v. Phelps*, 20 Wis. 398; *Tedford v. Wilson*, 3 Head, 311; *Polk v. Foster*, 7 Barb. 98; *Griffith v. Douglas*, 73 Me. 532.

<sup>4</sup> *Single v. Phelps*, 20 Wis. 398; *Mowry v. White*, 21 Wis. 417.

<sup>5</sup> *Gregg v. Sandford*, 24 Ill. 17; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252; *Duke v. Strickland*, 43 Vt. 494; *Parker v. Jacobs*, 14 S. C. 112; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Brown v. Allen*, 35 Iowa, 306. See, also, *Butler v. Hill*, 1 Baxt. 375; *Williamson v. Steele*, 3 Lea, 527, as to mortgage of a growing crop.

terest conveyed should be so particularly described as that it may be identified. Property, which is not fairly included in the description of the mortgaged property cannot pass by the mortgage, and parol evidence is not admissible to show that the parties intended the mortgage to cover the property which is in fact excluded by the terms of the description.<sup>1</sup> And if the description is wholly false, *i.e.*, goods cannot be found which answer to the description, then the mortgage is altogether invalid.<sup>2</sup> But where the description is partly true and partly false, if the goods intended to be covered by the mortgage may be identified and differentiated from others by the part of the description which is true, the false part may be rejected as surplusage, under the maxim *falsa demonstratio non nocet*.<sup>3</sup> If a description is so indefinite as that the goods covered by the mortgage cannot be identified, the defect may be cured, as between the parties to the mortgage, and as against parties who acquire interest in the goods subsequently, by the transfer of the goods to the possession of the mortgagee.<sup>4</sup>

But in order that a description may be sufficient to make the mortgage effectual, it need not be so exact and minute as that a stranger may, without any extraneous aid, and

<sup>1</sup> Hutton v. Arnett, 51 Ill. 198; Hunt v. Bullock, 23 Ill. 320; Ford v. Sutherland, 2 Mon. 440; Curtis v. Phillips, 5 Mich. 112; Partridge v. White, 59 Me. 564; Kemp v. Carnley, 3 Duer, 1; Crawshay v. Collins, J. & W. 267; 2 Russ. 339; Fletcher v. Powers, 131 Mass. 333; Van Patten v. Leonard, 55 Iowa, 520; Yant v. Harvey, 55 Iowa, 421.

<sup>2</sup> Bowman v. Roberts, 58 Miss. 126; Adams v. Commercial Nat. Bank, 53 Iowa, 491.

<sup>3</sup> King v. Aultman, 24 Kan. 246; Dodge v. Potter, 18 Barb. 198; Pettis v. Kellogg, 7 Cush. 456; Spaulding v. Mozier, 57 Ill. 148; Hurriss v. Kennedy, 48 Wis. 500; Lawrence v. Evarts, 7 Ohio St. 194; Fordyce v. Neal, 40 Mich. 705; Rowley v. Bartholomew, 37 Iowa, 374; Hunt v. Shackleford, 56 Miss. 397; Goff v. Pope, 83 N. C. 123.

<sup>4</sup> Parsons Savings Bank v. Sargent, 20 Kan. 576; Stephens v. Tucker, 14 N. J. L. 600; Pennington v. Jones, 57 Iowa, 37; Muir v. Blake, 57 Iowa, 662; Robinson v. Mauldin, 11 Ala. 977; Williamson v. Steele, 3 Lea, 580.

merely by reference to the description in the mortgage, select the goods which were intended to pass by the mortgage. It is a practical impossibility to bring the description to so high a state of perfection.<sup>1</sup> And hence, although parol evidence is not admissible for the purpose of making a description, or of supplying its fatal deficiencies<sup>2</sup> or of contradicting its express provisions;<sup>3</sup> it is admissible for the purpose of identifying the mortgaged goods, by proving their correspondence with the description in the mortgage.<sup>4</sup> And with the aid of parol evidence which is suggested by the description the most general sort of description is found to be sufficient to identify the property covered by the mortgage;<sup>5</sup> such, for example, as all my stock of goods or tools, "in or about the wheelwright's shop occupied by me,"<sup>6</sup> and

<sup>1</sup> *Comins v. Newton*, 10 Allen, 518.

<sup>2</sup> *Tindall v. Wasson*, 74 Ind. 495; *Hunt v. Shackelford*, 56 Miss. 397; *Montgomery v. Wight*, 8 Mich. 143; *Rose v. Scott*, 17 Q. B. U. C. 386.

<sup>3</sup> *Hurd v. Gallaher*, 14 Iowa, 394; *Hutton v. Arnett*, 51 Ill. 198.

<sup>4</sup> *Wagner v. Watts*, 2 Cranch C. C. 169; *Burns v. Harris*, 66 Ind. 536; *Duke v. Strickland*, 43 Ind. 494; *Elder v. Miller*, 60 Me. 118; *Skowhegan Bank v. Farrar*, 46 Me. 298; *Smith v. McLean*, 24 Iowa, 322; *Pike v. Calvin*, 67 Ill. 227; *Myers v. Ladd*, 26 Ill. 415; *Williams v. Merritt*, 23 Ill. 623; *Mattingly v. Darwin*, 23 Ill. 618; *Jordan v. Hamilton Co. Bank*, 11 Neb. 499; *Turner v. McFee*, 61 Ala. 468; *Beach v. Derby*, 19 Ill. 617; *Bell v. Prewitt*, 62 Ill. 361; *Spaulding v. Mozler*, 57 Ill. 148; *Stephens v. Tucker*, 14 N. J. L. 600; *Brooks v. Aldrich*, 17 N. H. 443; *Chapin v. Cram*, 40 Me. 561; *Holmes v. Hinkle*, 63 Ind. 518; *Ebberle v. Mayer*, 51 Ind. 235; *Tindall v. Wasson*, 74 Ind. 495.

<sup>5</sup> *Winter v. Landphere*, 43 Iowa, 471; *Yant v. Harvey*, 55 Iowa, 421; *Connally v. Spragins*, 66 Ala. 258; *Tindall v. Wasson*, 73 Ind. 495; *Lawrence v. Everts*, 7 Ohio St. 194; *Jordan v. Hamilton Co. Bank*, 11 Neb. 499; *Smith v. McLean*, 24 Iowa, 322.

<sup>6</sup> *Harding v. Coburn*, 12 Met. 333. See similar descriptions, *Burditt v. Hunt*, 25 Me. 419; *Russell v. Winne*, 37 N. Y. 591; *Crow v. Red River Co. Bank*, 52 Tex. 362; *Wolfe v. Dorr*, 24 Me. 104; *Conkling v. Shelley*, 28 N. Y. 360; *Gardner v. McEwen*, 19 N. Y. 123; *Stephens v. Pence*, 56 Iowa, 257; *Beach v. Derby*, 19 Ill. 617; *Skowhegan Bank v. Farrar*, 46 Me. 298; *Curtis v. Martz*, 14 Mich. 506; *Fore v. Hibbard*, 63 Ala. 410; *Adams v. Hill*, 10 Kan. 627; *Ebberle v. Mayer*, 51 Ind. 235; *Hurt v. Redd*, 64 Ala. 85; *Smith v. McLean*, 24 Iowa, 322.

descriptions even more indefinite are held to be sufficient, if explained by parol evidence, such, as "one black mule eight years old,"<sup>1</sup> two horses belonging to the mortgagor,<sup>2</sup> and the like.<sup>3</sup> A mortgage of "my entire crop of cotton and corn for the present year" is good;<sup>4</sup> but the mortgage is too indefinite if the year of planting is not given.<sup>5</sup> A general description of property to be mortgaged only becomes defective, when the property mortgaged constitutes a part of a larger bulk or a larger number of goods of the same kind. And, even where that is the case, if the means of distinguishing the part mortgaged from the rest are furnished in the description, the description is sufficiently accurate to make the mortgage valid.<sup>6</sup> And where the mortgage is made expressly to cover an undivided share in a joint property, it is not void for uncertainty of description.<sup>7</sup> But if the mortgage does not, in the terms of description, provide the means of identifying the part of the property which is covered by the mortgage, it is void for uncertainty, and parol evidence is not admissible to cure the defect.<sup>8</sup> And the mortgage is also void for uncer-

<sup>1</sup> *Connally v. Spragins*, 66 Ala. 258.

<sup>2</sup> *Brooks v. Aldrich*, 17 N. H. 448.

<sup>3</sup> *Elder v. Miller*, 60 Me. 118; *Sharpe v. Pearce*, 74 N. C. 600; *Burns v. Harris*, 66 Ind. 536; *Eddy v. Caldwell*, 7 Minn. 225.

<sup>4</sup> *Ellis v. Martin*, 60 Ala. 394; *Crine v. Tifts*, 65 Ga. 644.

<sup>5</sup> *Pennington v. Jones*, 57 Iowa, 37; *Mair v. Blake*, 57 Iowa, 665.

<sup>6</sup> A lot of lumber, part of a still larger lot, described as "the northerly 1,250,000 feet, lying in a certain creek, and bearing a certain mark. *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; *s. c.* 2 Fed. Rep. 128. "The first cotton that may be gathered." *Stearns v. Gafford*, 56 Ala. 544; *Robinson v. Mauldin*, 11 Ala. 977; *Shaffer v. Pickrell*, 22 Kan. 619. See *Crosswell v. Allis*, 25 Conn. 301; *Brown v. Holmes*, 18 Kau. 482; *Kelly v. Reed*, 57 Miss. 89.

<sup>7</sup> *Potts v. Newell*, 22 Minn. 561; *Zehner v. Aultman*, 74 Ind. 24.

<sup>8</sup> *Crosswell v. Allis*, 25 Conn. 301; *Kelly v. Reid*, 57 Miss. 89; *Draper v. Perkins*, 57 Miss. 277; *Fowler v. Hunt*, 48 Wis. 345; *Washington v. Love*, 34 Ark. 98; *Richardson v. Alpena Lumber Co.*, 40 Mich. 208; *Golden v. Cockril*, 1 Kan. 259; *Parsons Savings Bank v. Sargent*, 20 Kan. 576; *Williamson v. Steele*, 3 Lea, 527; *Montgomery v. Wight*, 8



tainty, where, under a general description of the mortgaged goods, an uncertain quantity is excepted from the operation of the mortgage; as, for example, where the mortgage is made to cover "all the mortgagor's personal effects excepting such as are exempt from attachment or from levy and sale under execution."<sup>1</sup> But the exemption from attachment and execution will not affect the validity of the mortgage, as to the articles which are expressly enumerated in the description, when there is other property to which the exception can apply. The uncertainty would only affect the relation of the mortgage to the goods not specifically described.<sup>2</sup>

If the mortgage provides for the annexation of a schedule or enumeration of the things which are covered by the mortgage,<sup>3</sup> or contains a reference to a schedule or description to be found in some other deed or mortgage,<sup>4</sup> the scope of the mortgage is generally determined by the terms of the schedule; and if the schedule is omitted, after being referred to in the mortgage, the mortgage is invalid, unless it contains some independent general description which is sufficiently definite to identify the property mortgaged in

Mich. 148; *Blakely v. Patrick*, 67 N. C. 40; *Nicholson v. Karpe*, 58 Miss. 34; *Person v. Wright*, 35 Ark. 169; *Newell v. Warner*, 44 Barb. 263; *Bullock v. Williams*, 16 Pick. 33. But although such a mortgage may be void for uncertainty as against third parties, it is good as between the parties to the mortgage, as to whom it amounts to a power in the mortgagee to select out of the larger bulk or number, the quantity called for by the mortgage. *Call v. Gray*, 37 N. H. 428; *Heyward's Case*, 2 Coke, 86.

<sup>1</sup> *Newell v. Warner*, 44 Barb. 258. See, to same general effect, *Fowler v. Hunt*, 48 Wis. 345, where the exception was as to stock in trade to the amount of \$200.

<sup>2</sup> *Giddey v. Uhl*, 27 Mich. 94.

<sup>3</sup> *Weeks v. Maillardet*, 14 East, 568; *Edgell v. Hart*, 9 N. Y. 213; *England v. Downs*, 2 Beav. 522. When a schedule is found annexed to a mortgage, in the body of which there is provision for one, the *prima facie* presumption is that the schedule was attached to the mortgage at or before its execution. *Belknap v. Wendell*, 21 N. H. 175.

<sup>4</sup> *Newman v. Tymeson*, 13 Wis. 172.

whole or in part.<sup>1</sup> But the scope of the mortgage cannot be enlarged by including in the schedule things which do not fairly come within the general description contained in the mortgage.<sup>2</sup> So, also, if the mortgage contains a general description and refers to a schedule for a more specific enumeration of the things covered by it, instead of its covering everything which might fairly be included in the general description, its operation will be confined to those which are specifically described in the schedule.<sup>3</sup> On the other hand, a general description of goods, following a special enumeration of articles, will bring within the operation of the mortgage everything of the same kind, as those which are especially mentioned; but the scope of the mortgage cannot be so enlarged by the general description as to include things unlike those which are specifically described.<sup>4</sup>

As long as the goods may be identified by the mortgagee, any change in the character<sup>5</sup> or location<sup>6</sup> of the things covered by the mortgage will not affect the mortgagee's right to them. But as against third persons having no notice of the agreement other property cannot be put in the place of the property described by the mortgage, al-

<sup>1</sup> *England v. Downs*, 2 Beav. 522; *Van Heusen v. Radcliffe*, 17 N. Y. 580; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306.

<sup>2</sup> *Ex parte Jardine*, 10 L. R. Ch. App. 322.

<sup>3</sup> *Wood v. Rowcliffe*, 6 Exch. 407; *Barton v. Dawes*, 19 L. J. C. B. 302; *Gann v. Ruttan*, 7 Up. Can. C. P. 516; *Kingston v. Chapman*, 9 Up. Can. C. P. 180; *Morrell v. Fisher*, 4 Exch. 591; *s. c.* 19 L. J. Exch. 273.

<sup>4</sup> *Russell v. Winne*, 37 N. Y. 591; *s. c.* 4 Abb. Pr. (N. S.) 384; *Veazie v. Somerbig*, 5 Allen, 280; *Thurber v. Minturn*, 62 How. Pr. 27; *Dixon v. Coke*, 77 N. C. 205; *Smith v. McCullough*, 104 U. S. 25; *Brainerd v. Peck*, 84 Vt. 496; *Goulding v. Swett*, 13 Gray 517.

<sup>5</sup> *Comius v. Newton*, 10 Allen, 518; *Crosby v. Baker*, 6 Allen, 295; *Lawrence v. Evarts*, 7 Ohio St. 194; *Smith v. Beattie*, 31 N. Y. 542.

<sup>6</sup> *Duke v. Strickland*, 48 Ind. 494; *Hackleman v. Goodman*, 75 Ind. 202; *White v. Brown*, 12 Up. Can Q. B. 477; *Wheelden v. Wilson*, 44 Me. 1; *Brown v. Thompson*, 59 Me. 372; *Smith v. Jenks*, 1 Den. 580; *Rider v. Edgar*, 54 Cal. 127.

though such a substitution would be binding between the parties and those having notice of the same.<sup>1</sup>

§ 234. **Description of the debt — What is a sufficient indebtedness.** — There can be no mortgage without a mortgage debt or liability. The debt may be either antecedent or pre-existing<sup>2</sup> or contemporary, or it may be incurred in the future, the last being known as mortgages for future advances.<sup>3</sup> A mortgage may also be given to secure the performance of a contingent liability.

<sup>1</sup> Powers v. Freeman, 2 Lansing, 1271; Sharp v. Pearce, 74 N. C. 600.

<sup>2</sup> Kranert v. Simon, 65 Ill. 344; Prior v. White, 12 Ill. 261; Gilchrist v. Gough, 63 Ind. 576; Wright v. Bundy, 11 Ind. 398; Smith v. Worman, 19 Ohio St. 145; Turner v. McFee, 61 Ala. 468; Steiner v. McCall, 61 Ala. 406; Cromelin v. McCauley, 67 Ala. 542; Paine v. Benton, 32 Wis. 491; Machette v. Wanless, 1 Col. 225; Busenbarke v. Ramey, 53 Ind. 499; McLaughlin v. Ward, 77 Ind. 383; Butters v. Haughwont, 42 Ill. 18; Turner v. Killian, 12 Neb. 580. In New York, and elsewhere, the mortgagee has not the rights of a *bona fide* purchaser as against the true owner of the property, if the mortgage is given for a pre-existing debt. Woodburn v. Chamberlin, 17 Barb. 446; Van Slyck v. Newton, 10 Hun, 554; Craft v. Russell, 67 Ala. 9; Kennedy v. Nat. Union Bank, 23 Hun, 494; Thompson v. Van Vechten, 27 N. Y. 568. But in these exceptional States, the mortgage of a pre-existing debt may be enforced against a general creditor (Walker v. Henry, 85 N. Y. 130), but not against a prior unrecorded mortgage. Tiffany v. Warren, 27 Barb. 571.

<sup>3</sup> Jones v. Guaranty & Indemnity Co., 101 U. S. 622; McCarty v. Chalfant, 14 W. Va. 531; Brown v. Kiefer, 71 N. Y. 610; Monnot v. Ibert, 33 Barb. 24; Walker v. Snediker, 1 Hoff. Ch. 145; Hendrix v. Gorey, 8 Ore. 406; Jarratt v. McDaniel, 32 Ark. 598; Ackerman v. Hunsicker, 85 N. Y. 43; Miller v. Finn, 1 Neb. 254, 287; Speer v. Skinner, 85 Ill. 282; Bank of Utica v. Finch, 3 Barb. Ch. 298; Craig v. Toppin, 2 Sandf. Ch. 78; Ex parte Ames, 1 Lowell, 561; Barnard v. Moore, 8 Allen, 278. Some of the earlier cases held that the mortgage may be made to cover future advances, if it was also given to secure the payment of an existing indebtedness. Lawrence v. Tucker, 23 How. 14; Holbrook v. Baker, 5 Me. 309; Wescott v. Gunn, 4 Duer, 107; Carpenter v. Blote, 1 E. D. Smith, 491; North v. Crowell, 11 N. H. 251; Page v. Ordway, 40 N. H. 253; Fairbanks v. Bloomfield, 5 Duer, 434; Googins v. Gilmore, 47 Me. 9; Badlam v. Tucker, 1 Pick. 389. But the mortgage is now held to be valid without any existing debt. Schuelenberg v. Martin, 1 McCrary, 348; Womble v. Leach, 83 N. C. 84; Brown v. Kiefer, 71 N. Y. 610.

ity, as, for example, to secure a surety against loss on his obligation as a surety.<sup>1</sup> The mortgage may be given to secure two or more debts, and it will not be necessary that all the debts should be owing to the mortgagee.<sup>2</sup> But in order that a debt may be secured by the mortgage, it should be so definitely described and limited in the mortgage that it may be recognized and distinguished from other obligations.<sup>3</sup> As long as the debts secured may be identified by the description, it is not necessary for the description to contain a full statement of all the particulars of the debt.<sup>4</sup> The most general sort of a description is sufficient, it not being necessary to state in the mortgage the amount of the debt, whether the sum was certain or uncertain,<sup>5</sup> or the time of performance of the obligation.<sup>6</sup> It is also unnecessary for the mortgage to contain a

<sup>1</sup> *Robinson v. Hill*, 15 N. H. 477; *Curtis v. Tyler*, 9 Paige Ch. 432; *Richards v. Yoder*, 10 Neb. 329; *Eastman v. Foster*, 8 Met. 19. See, also, *Goodheart v. Johnson*, 88 Ill. 58; *Frenchard v. Warner*, 18 Ill. 142.

<sup>2</sup> *Jones on Mortgages*, § 135; *Spencer v. Pierce*, 5 R. I. 63.

<sup>3</sup> *Robertson v. Stark*, 15 N. H. 12; *Partridge v. Swazey*, 46 Me. 414; *Fink v. Branch*, 16 Conn. 260; *Boody v. Davis*, 20 N. H. 140; *McKinster v. Babcock*, 20 N. Y. 375; *Paine v. Benton*, 32 Wis. 491; *Hurd v. Robinson*, 11 Ohio St. 232; *Kimball v. Myers*, 21 Mich. 276; *Follett v. Heath*, 15 Wis. 601; *Booth v. Barnum*, 9 Conn. 286; *Ricketson v. Richardson*, 16 Cal. 330; *Moore v. Fuller*, 6 Oreg. 272; *Sheafe v. Gerry*, 18 N. H. 245; *Gilman v. Moody*, 43 N. H. 329; *McDaniels v. Calvin*, 16 Vt. 300; *Aull v. Lee*, 61 Mo. 160; *Hughes v. Edwards*, 9 Wheat. 469; *Boyd v. Baker*, 43 Md. 182; *Kellogg v. Frazier*, 40 Iowa, 502; *Warner v. Brooks*, 14 Gray, 107; *Johns v. Church*, 12 Pick. 557; *Hough v. Bailey*, 32 Conn. 288; *Williams v. Hilton*, 35 Me. 547.

<sup>4</sup> *Robertson v. Stark*, 15 N. H. 109; *Colby v. Everett*, 10 N. H. 425; *Clark v. Hyman*, 55 Iowa, 26; *Hurd v. Robinson*, 11 Ohio St. 232; *Holmes v. Hinkle*, 63 Ind. 518; *North v. Crowell*, 11 N. H. 251. The rule is somewhat different and stricter in Connecticut. *Rood v. Welch*, 28 Conn. 157; *Utley v. Smith*, 24 Conn. 290, 314.

<sup>5</sup> *Pike v. Collins*, 33 Me. 38; *Somersworth Sav. Bank v. Roberts*, 38 N. H. 22. But see, *contra*, *Hart v. Chalker*, 14 Conn. 77; *Pearce v. Hall*, 12 Bush, 209, which hold that where the mortgage debt is a fixed sum, the amount should be stated.

<sup>6</sup> *Byran v. Gordon*, 11 Mich. 531; *Fuller v. Acker*, 1 Hill, 473.

statement of the amount, where the mortgage is given for future advances, if the purpose for which they are to be made is clearly described.<sup>1</sup> But if the amount is given, the mortgage cannot be enforced for a larger amount, as against subsequent purchasers and mortgagees.<sup>2</sup> It is likewise not required that the mortgage should show on its face that it was given for future advances, if it is possible to ascertain from the description, with the aid of extraneous evidence, what debts or what amount of debt were intended to be secured by the mortgage.<sup>3</sup> But although the amount and other particulars need not be stated in the mortgage, means must be provided in it, by way of reference to other papers, accounts or records, for ascertaining all the essential particulars. Thus, mortgages have been held good, where they were intended to secure a general indebtedness, and which was described in the mortgage as "what I may owe on book," "all the notes or agreements I now owe," "all sums that the mortgagee may become liable to pay," and the like.<sup>4</sup> And

<sup>1</sup> *Jarratt v. McDaniel*, 32 Ark. 598; *Hughes v. Worley*, 1 Bibb, 200; *Faye v. Bank of Illinois*, 11 Ill. 357; *Hubbard v. Savage*, 8 Conn. 215; *Shirras v. Craig*, 7 Cranch, 34; *United States v. Hooe*, 3 Cranch, 78; *Preble v. Conger*, 66 Ill. 370; *Crane v. Deming*, 7 Conn. 387; *Allen v. Lathrop*, 46 Ga. 133. But see, *contra*, *Wilson v. Russell*, 13 Md. 494; *Leeds v. Cameron*, 3 Sumn. 488; *N. H. Bank v. Willard*, 10 N. H. 210.

<sup>2</sup> *Franklin v. Meyer*, 36 Ark. 96; *Bell v. Radcliff*, 32 Ark. 645.

<sup>3</sup> *Lawrence v. Tucker*, 28 How. 14; *Craig v. Tappin*, 3 Sandf. Ch. 78; *Speer v. Skinner*, 35 Ill. 282; *Collins v. Carille*, 13 Ill. 254; *Tison v. People's Saving & Loan Ass'n*, 57 Ala. 323; *Stone v. Lane*, 10 Allen, 74; *North v. Crowell*, 11 N. H. 251; *McConnell v. Scott*, 67 Ill. 274; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Shirras v. Craig*, 7 Cranch, 34; *Monnot v. Ibert*, 33 Barb. 24; *Bodley v. Anderson*, 2 Bradw. 450. But see, *contra*, *Divver v. McLaughlin*, 2 Wend. 596; *Walker v. Snediker*, 1 Hoff. Ch. 145; *James v. Morey*, 2 Cow. 246, 293.

<sup>4</sup> *Page v. Ordway*, 40 N. H. 253; *Merrills v. Swift*, 18 Conn. 257; *Lewis v. De Forrest*, 20 Conn. 427; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Emery v. Owings*, 7 Gill, 488; *Esterly v. Purdy*, 50 How. Pr. 350; *Mix v. Cowles*, 20 Conn. 420; *United States v. Sturges*, 1 Paine, 525; *DeMott v. Benson*, 4 Edw. Ch. 297; *Booth v.*

if it is necessary, parol evidence is admissible to identify the mortgage debt, and to establish its correspondence with the description.<sup>1</sup> But parol evidence is not admissible to contradict the description by showing that the parties intended to secure by the mortgage a debt which does not correspond to, or fall within, the description of the mortgage debt,<sup>2</sup> and hence a totally false description cannot be aided by parol evidence. Parol evidence is not admissible for the purpose of making a description of the debt.<sup>3</sup> Nor is it admissible to make a mortgage cover future advances, which were not contemplated at the time of the execution of the mortgage.<sup>4</sup>

If the mortgage is given for a larger sum than was actually due, it is presumptive evidence of fraud, but it is not conclusive. It may be shown that the larger sum was given by mistake,<sup>5</sup> and in any event the mort-

Barnum, 9 Conn. 286; *Machette v. Wanless*, 1 Col. 225; *Fisher v. Otis*, 3 Chand. 83; *Seymour v. Darrow*, 81 Vt. 142; *Shirras v. Caig*, 7 Cranch, 34.

<sup>1</sup> *Clark v. Houghton*, 12 Gray, 38; *Pierce v. Parker*, 4 Met. 80; *Cushman v. Luther*, 53 N. H. 562; *Clark v. Hyman*, 55 Iowa, 23; *Partridge v. Swazey*, 46 Me. 414; *Quinn v. Schmidt*, 91 Ill. 84; *Dodge v. Potter*, 12 Barb. 193; *Melvin v. Fellows*, 33 N. H. 401; *Johns v. Church*, 12 Pick. 557; *Crafts v. Crafts*, 13 Gray, 168; *Hurd v. Robinson*, 11 Ohio St. 38; *N. H. Bank v. Willard*, 10 N. H. 210; *Aull v. Lee*, 61 Mo. 160; *Babcock v. Lisk*, 57 Ill. 327; *Doe v. McLoskey*, 1 Ala. 708; *Gill v. Pinney*, 12 Ohio St. 38; *Baxter v. McIntire*, 13 Gray, 166; *Bell v. Fleming*, 1 Beasl. 13; *Hall v. Tufts*, 18 Pick. 455; *Jackson v. Bowen*, 7 Cow. 13.

<sup>2</sup> *Morris v. Tillson*, 81 Ill. 607; *Varney v. Hawes*, 68 Me. 442; *Barker v. Buel*, 5 Cush. 519.

<sup>3</sup> *Follett v. Heath*, 15 Wis. 601; *Shepardson v. Whipple*, 107 Mass. 279; *Jewett v. Preston*, 27 Me. 400; *Babcock v. Lisk*, 57 Ill. 327; *Hall v. Tufts*, 18 Pick. 455; *Walker v. Paine*, 31 Barb. 213; *Storms v. Storms*, 3 Bush, 77; *Doyle v. White*, 26 Me. 341.

<sup>4</sup> *Monnot v. Ibert*, 33 Barb. 24; *Davenport v. McChesney*, 86 N. Y. 248.

<sup>5</sup> *Wood v. Scott*, 55 Iowa, 114; *Wooley v. Fry*, 30 Ill. 158; *Barkow v. Sanger*, 47 Wis. 500; *Blakeslee v. Rossman*, 43 Wis. 116; *Butts v. Peacock*, 23 Wis. 359; *Strauss v. Kranert*, 56 Ill. 254; *Kalk v. Fielding*, 50 Wis. 339; *Bell v. Prewitt*, 62 Ill. 361; *Kaysing v. Hughes*, 64 Ill. 123.

gage can only be enforced for the amount which is actually due.<sup>1</sup>

While a mortgage can be made to secure one against a contingent liability, which is not only itself uncertain, but whose consequences in the shape of damages are also uncertain, it has been held that the damages for the breach of the condition of a mortgage must always be liquidated, in order that the mortgage may be foreclosed by the mortgagee's sale under a power of sale; the reason being that, in an *ex parte* proceeding, like a sale under a power of sale, the unliquidated damages could not be liquidated.<sup>2</sup> In such a case, resort must be made to a court for foreclosure.

§ 235. **Date of the mortgage.**—If a mortgage be dated, it is presumed that it was executed on the given day; but it is admissible to prove a mistake in the mortgage date.<sup>3</sup> And if the mortgage contains no date, it is always possible to prove by parol evidence when the mortgage was executed.<sup>4</sup> But it is not possible to show that the day of execution was later than the date of acknowledgment, unless you likewise prove an error in the latter date.<sup>5</sup>

§ 236. **Formality of execution — Signing and sealing.**—The statute of frauds, in every provision for a written instrument, requires it to be signed by the party to be charged. This is so well known, that citations are unnecessary. Hence a chattel mortgage would have to be signed or subscribed by the mortgagor. If the statute requires *subscription* instead of *signing*, the name would

<sup>1</sup> National Bank v. Sprague, 20 N. J. Eq. 13; Kaysing v. Hughes, 64 Ill. 123.

<sup>2</sup> Fowler v. Hoffman, 31 Mich. 215.

<sup>3</sup> Foster v. Perkins, 42 Me. 168; Stonebreaker v. Kerr, 40 Ind. 186; Partridge v. Swazey, 46 Me. 414; Clark v. Houghton, 12 Gray, 38.

<sup>4</sup> Burdick v. Hunt, 25 Me. 419.

<sup>5</sup> Merrill v. Dawson, Hemp. 563. See Durfee v. Grinnell, 69 Ill. 371.

have to be written at the bottom of or under the mortgage. Otherwise, the signature may appear in any part of the instrument.

But, although it is quite common for chattel mortgages to be sealed, and even though the statutory forms of such mortgages may [as in Maryland] contain seals, in the absence of an express statutory requirement, the validity of the chattel mortgage is in nowise affected by the absence of a seal.<sup>1</sup>

§ 237. **Delivery and acceptance,**—of the mortgage are concurrent acts, both of which are essential to the validity of the mortgage; the acceptance of the mortgagee being as necessary as the transfer or delivery of the deed by the mortgagor.<sup>2</sup> It is not necessary for either of the parties to do these acts in person. The delivery, as well as the acceptance, may be done for the mortgagor and mortgagee respectively by their duly authorized agent.<sup>3</sup>

While a delivery of the mortgage to the recorder for registration is not in itself sufficient to support a presumption that the mortgagee has accepted the mortgage, and hence not sufficient to pass title to the mortgaged property,<sup>4</sup> not even when it is shown that the mortgagee knows of the execution of the mortgage and of its delivery to the recorder;<sup>5</sup> yet if the delivery to the recorder is in pur-

<sup>1</sup> *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205; *Tapley v. Butterfield*, 1 Met. 515; *Gibson v. Warden*, 14 Wall. 244; *Gerry v. White*, 47 Me. 504; *Sherman v. Fitch*, 98 Mass. 59, 64; *Milton v. Mosher*, 7 Met. 244.

<sup>2</sup> *Jewett v. Preston*, 27 Me. 400; *Foster v. Perkins*, 42 Me. 168; *Welch v. Sackett*, 12 Wis. 243; *Miller v. Blinbury*, 21 Wis. 676; *McCutchin v. Platt*, 22 Wis. 561; *Sargeant v. Solberg*, 22 Wis. 132.

<sup>3</sup> *Sargeant v. Solberg*, 22 Wis. 132.

<sup>4</sup> *Day v. Griffith*, 15 Iowa 104; *Oxnard v. Blake*, 45 Me. 607; *Maynard v. Maynard*, 10 Mass. 456; *Dole v. Bodman*, 3 Met. 139; *McCourt v. Myers*, 8 Wis. 236; *Cobb v. Chase*, 54 Iowa, 253.

<sup>5</sup> *Cobb v. Chase*, 54 Iowa, 253.



suance of the agreement of the parties to the mortgage, there will be sufficient evidence of delivery and acceptance, in order to pass title.<sup>1</sup> The possession of the note and mortgage by the mortgagee supports the presumption that they have been duly delivered and accepted.<sup>2</sup> On the other hand, the possession of these papers by the mortgagor raises the presumption either that they have not been delivered, or that they have been satisfied.<sup>3</sup> As long as the rights of third parties have not intervened, the mortgagee may accept the mortgage at any subsequent time.<sup>4</sup> It is a question of fact for the jury whether there has been a delivery and acceptance.<sup>5</sup>

If the mortgage is given to secure two or more debts payable to different persons, it is not necessary to deliver the mortgage to each mortgagee. Delivery to one of them is sufficient.<sup>6</sup>

§ 238. **Delivery and possession of mortgaged chattels.**— At common law, the chattel mortgage, like any other sale, could not be enforced against third persons, who acquire interests in the property without notice of its existence, unless the chattels mortgaged were delivered into the possession of the mortgagee. The retention of the possession by the mortgagor made the mortgage *prima facie*

<sup>1</sup> *Cooper v. Jackson*, 4 Wis. 537; *Jordan v. Farnsworth*, 15 Gray, 517; *Everett v. Whitney*, 55 Iowa, 146; *Thayer v. Stark*, 6 Cush. 11. But the agreement must relate specifically to the mortgage which is recorded, in order to be equivalent to an acceptance. An agreement that whenever a mortgage is executed it shall be delivered to the recorder, is held to be insufficient proof of acceptance. *Cobb v. Chase*, 54 Iowa, 253; *Day v. Gr fifth*, 15 Iowa, 104.

<sup>2</sup> *Molineux v. Coburn*, 6 Gray, 124; *Foster v. Perkins*, 42 Me. 168.

<sup>3</sup> *Bullock v. Narrott*, 49 Ill. 62.

<sup>4</sup> *Sherman v. Fitch*, 98 Mass. 53; *Dole v. Bodman*, 3 Met. 139; *Brown v. Platt*, 8 Bosw. 324.

<sup>5</sup> *Molineux v. Coburn*, 6 Gray, 124; *Roberts v. Jackson*, 1 Wend. 478; *Jordan v. Farnsworth*, 15 Gray, 517.

<sup>6</sup> *Hubby v. Hubby*, 5 Cush. 516.

invalid against subsequent purchasers and creditors, although valid between the parties to the mortgage and third persons having notice of the mortgage.<sup>1</sup> The recording laws of the different States, to which particular reference is given in a subsequent section,<sup>2</sup> now provide that the mortgage shall be absolutely void as to third persons, unless the mortgage has been duly recorded or filed, or the mortgaged chattels have been delivered into the possession of the mortgagee. These requirements are in the alternative, and the compliance with one renders compliance with the other unnecessary.<sup>3</sup> Although an immediate compliance with one of these requirements has been held under the provisions of the special statutes to be necessary to make the mortgage valid as against subsequent purchasers and creditors,<sup>4</sup> the better and the generally prevailing opinion, is that an unrecorded chattel mortgage is altogether valid, if the mortgagee takes possession before any third person has acquired adverse rights therein by sale or by attachment.<sup>5</sup> A delivery of a part of the mortgaged goods to the mortgagee has been held to render the mortgage valid *pro tanto*,<sup>6</sup>

<sup>1</sup> *Russell v. Fillmore*, 15 Vt. 130; *Sturgis v. Warren*, 11 Vt. 433; *Haven v. Low*, 2 N. H. 13; *Morrow v. Turney*, 35 Ala. 131; *Homes v. Crane*, 2 Pick. 607; *Woodward v. Gates*, 9 Vt. 358.

<sup>2</sup> See *post*, § 239.

<sup>3</sup> *Frank v. Miner*, 50 Ill. 444; *Bullock v. Williams*, 16 Pick. 33; *Forbes v. Parker*, 16 Pick. 462; *Shurtleff v. Willard*, 19 Pick. 202.

<sup>4</sup> *Waller v. Rossman*, 45 Mich. 333; *Williamson v. N. J. Southern R. Co.*, 28 N. J. Eq. 277; *s. c.* 29 N. J. Eq. 311; *Currie v. Knight*, 34 N. J. Eq. 485, 486.

<sup>5</sup> *Cobel v. Nonemaker*, 78 Pa. St. 501; *Frank v. Miner*, 50 Ill. 444; *Brown v. Webb*, 20 Ohio, 389; *Parsell v. Thayer*, 39 Mich. 467; *Cute v. Steele*, 6 Nev. 339; *Field v. Baker*, 12 Blatchf. 438; *Cameron v. Marvin*, 26 Kan. 612; *Wood v. Weimar*, 104 U. S. 786; *Hamlin v. Jerrard*, 72 Me. 62, 79; *Greeley v. Reading*, 74 Mo. 309; *Baldwin v. Flash*, 58 Miss. 593; *Hansett v. Harrison*, 105 U. S. 405; *Brown v. Platt*, 8 Bosw. 324; *Moresi v. Swift*, 15 Nev. 215; *Eastman v. Water Power Co.*, 24 Minn. 437; *Chase v. Denny*, 130 Mass. 566; *McTaggart v. Rose*, 14 Ind. 230; *Chipnon v. Felkert*, 68 Ill. 284.

<sup>6</sup> *Stewart v. Smith*, 60 Iowa (1882), 275.

although a contrary opinion has been rendered by an eminently respectable authority<sup>1</sup> on the ground that the mortgage itself is void if any part of the mortgaged goods is retained in the possession of the mortgagor.

The delivery of the goods to the mortgagee not only avoids the defect, arising from a want of record, but likewise makes the mortgage valid, although it might be otherwise invalid on account of insufficient description of the property,<sup>2</sup> the insufficient execution of the mortgage, and the like.<sup>3</sup> What will constitute a sufficient delivery of the possession of the mortgaged goods, in order to satisfy the requirement of the law, will depend in each case upon the facts of each case. It is clear that the delivery need not be made to the mortgagee in person. It may be made to some duly authorized agent<sup>4</sup> or trustee<sup>5</sup> of the mortgagee. It has been held to be permissible for the mortgagor to employ the mortgagor to act as his agent in the care of the goods, especially when the mortgagee has removed the goods to some place of deposit selected by himself.<sup>6</sup> But the general rule undoubtedly prohibits such an employment of the mortgagor operating as a change of possession,<sup>7</sup> unless the change of ownership has, by a change in books, sign-board, etc., been sufficiently notorious, as to support the

<sup>1</sup> *Benedict v. Smith*, 10 Paige, 126.

<sup>2</sup> *Morrow v. Reed*, 30 Wis. 81, 84. See *ante*, § 235.

<sup>3</sup> *Nash v. Norment*, 5 Mo. App. 545; *Greeley v. Reading*, 74 Mo. 309; *Cameron v. Marvin*, 26 Kan. 624. See *Peltee v. Dustin*, 58 N. H. 309; *Janvin v. Fogg*, 49 N. H. 351.

<sup>4</sup> *McPortland v. Read*, 11 Allen, 281; *Horner v. Stout*, 5 Cal. 166; *Carpenter v. Snelling*, 97 Mass. 452; *Wheeler v. Nicholls*, 32 Me. 233. See *Train v. Wellington*, 12 Mass. 495.

<sup>5</sup> *Jones v. Swayze*, 42 N. J. L. 279.

<sup>6</sup> *Dayton v. People's Savings Bank*, 28 Kan. 421.

<sup>7</sup> *Steele v. Benham*, 84 N. Y. 634; *Hanford v. Archer*, 4 Hill, 271; *Pickard v. Marriage*, L. R. 1 Ex. D. 864; *Doyle v. Stevens*, 4 Mich. 87; *Flagg v. Pierce*, 28 N. H. 348; *Porter v. Parmley*, 52 N. Y. 185; *Camp v. Camp*, 2 Hill, 628; *Brunswick v. McClay*, 7 Neb. 137.

presumption that no one has been misled by the continuance of the mortgagor's actual possession.<sup>1</sup> Constructive delivery by the mortgagor is never sufficient to render the mortgage valid as against third persons. The delivery must be as actual and notorious as the circumstances will permit.<sup>2</sup> Ponderous articles even must be given an actual delivery, although of course, it need not be a manual delivery;<sup>3</sup> and if they cannot be readily removed, it is held to be a sufficient delivery for them to be pointed out to the mortgagee, with the understanding that the possession has been thereby transferred.<sup>4</sup> If the warehouse, in which the goods are stored, is turned over to the mortgagee, it would necessarily constitute a delivery of the goods themselves.<sup>5</sup> But a concurrent possession of the goods by the mortgagor and mortgagee is insufficient.<sup>6</sup>

If the goods are in the possession of a third person as agent of the mortgagor, there is a sufficient transfer of possession to the mortgagee, if by the understanding of all the parties concerned the bailee undertakes in the future to hold the goods for the mortgagee.<sup>7</sup> But the party in

<sup>1</sup> *Doyle v. Stevens*, 4 Mich. 87. See *Moody v. Haselden*, 1 S. C. 129.

<sup>2</sup> *Crandall v. Brown*, 18 Hun, 461; *Steele v. Benham*, 84 N. Y. 634; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Topping v. Lynch*, 2 Rob. 484; *Nicholson v. Temple*, 4 Pugs. & B. (N. B.) 248; *Fraser v. Gilbert*, 11 Hun, 684; *Ceas v. Bramley*, 18 Hun, 187.

<sup>3</sup> *Anderson v. Brenneman*, 44 Mich. 198; *Menzies v. Dodd*, 19 Wis. 343; *Doak v. Brubaker*, 1 Nev. 218.

<sup>4</sup> *Morrow v. Reed*, 30 Wis. 81; *Ticknor v. McClelland*, 84 Ill. 471; *Bull v. Griswold*, 19 Ill. 631; *Thompson v. Wilhite*, 81 Ill. 356. But see *Gittings v. Nelson*, 86 Ill. 596.

<sup>5</sup> *Weaver v. Reilly*, 21 Hun, 585; *Smith v. Skeary*, 47 Conn. 47.

<sup>6</sup> *Sumner v. Dalton*, 58 N. H. 295; *Griffith v. Douglass*, 73 Me. 532; *Hale v. Sweet*, 40 N. Y. 97; *Flagg v. Pierce*, 58 N. H. 343.

<sup>7</sup> *Morse v. Powers*, 17 N. H. 286; *Smith v. Post*, 1 Hun, 516; *s. c.* 3 T. & C. 647; *Nash v. Ely*, 19 Wend. 523; *Doak v. Brubaker*, 1 Nev. 218; *Wheeler v. Nichols*, 32 Me. 233; *Hodges v. Hurd*, 47 Ill. 363; *Goodwin v. Kelly*, 42 Barb. 194; *Gaar v. Hurd*, 92 Ill. 315.

possession must be notified of the change of possession, in order to be sufficient.<sup>1</sup>

If anything is necessary for the purpose of specializing the mortgaged chattels, such as counting, measuring or separating from a larger quantity what is covered by the mortgage, there can be no delivery and transfer of title any more than in the case of absolute sale,<sup>2</sup> unless by an actual delivery of the whole, the power of counting, measuring or separating his share is reposed in the mortgagee.<sup>3</sup> The burden of proving a delivery or change of possession is thrown on the mortgagee, who claims title by such change of possession.<sup>4</sup>

§ 239. **The general provisions of the recording law.** — In order that the mortgagor of chattels might retain the possession of them without invalidating the mortgage, and thus be enabled by the prosecution of his business or the manipulation of his property, to secure the means of paying off the debt, to secure which the chattel mortgage had been given; it is now provided by statute in most of the States, if not in all,<sup>5</sup> that if a chattel mortgage is recorded or filed, in strict compliance with the requirements of the recording act, the mortgage is good and valid against subsequent purchasers and creditors. In some of the States, the provision is that the mortgage shall be recorded, whereas in other States the mortgage is required to be filed with the clerk of court or recorder. Recording requires transcription in the public books of record; while in filing a paper with a public officer, nothing more is required than that the paper shall

<sup>1</sup> *Sheldon v. Warner*, 26 Mich. 403.

<sup>2</sup> *Frost v. Woodruff*, 54 Ill. 155; *Seckel v. Scott*, 66 Ill. 106.

<sup>3</sup> See *Crofoot v. Bennett*, 2 N. Y. 253; *Weld v. Cutter*, 2 Gray, 195; *Tyler v. Strang*, 21 Barb. 198; *Bullock v. Williams*, 16 Pick. 33.

<sup>4</sup> *McCarthy v. Grace*, 23 Minn. 182.

<sup>5</sup> Unless recently enacted, no provision for recording chattel mortgages has been made in Pennsylvania, Louisiana and Nevada. *Jones on Chattel Mortgages*, § 190.

be put into his possession, and a memorandum be made by him in such a way that any one interested in the matter may ascertain the presence and existence of the mortgage. Where, however, the statute requires the mortgage to be filed, instead of being recorded, it usually contains the further requirement that to be valid against subsequent purchasers and creditors, the mortgage, the original or a copy, must be refiled at stated periods, annually or biennially, the object being to give renewed notices of the condition of the property.<sup>1</sup> The copy of the mortgage is required to be accompanied by a full and accurate statement of the interest of the mortgagee.<sup>2</sup>

If the mortgagor resides within the State, the mortgage must be recorded or filed in the county in which he resides when the mortgage was executed; but if the mortgagor lives outside of the State, the mortgage must be recorded or filed in the county in which the mortgaged chattels were at the time of the execution of the mortgage.<sup>3</sup> Any change in the mortgagor's residence or in the location of the chattels after execution of the mortgage will not affect the question as to place of record.<sup>4</sup> When some of the mort-

<sup>1</sup> See *Newell v. Warren*, 44 N. Y. 244; *Wisser v. O'Brien*, 3 J. & Sp. 149; *Lee v. Huntoon*, 1 Hoff. Ch. 447; *Meech v. Patchin*, 14 N. Y. 71; *Marsden v. Cornell*, 62 N. Y. 215; *Stockham v. Allard*, 4 T. & C. 279; *s. c.* 2 Hun, 67; *Fitch v. Humphrey*, 1 Den. 163; *Seaman v. Eager*, 16 Ohio St. 209; *Day v. Munson*, 14 Ohio St. 488; *Briggs v. Mette*, 42 Mich. 12; *Griffin v. Forest*, 49 Mich. (1882) 309.

<sup>2</sup> *Fitch v. Humphrey*, 1 Den. 163; *Marsden v. Cornell*, 62 N. Y. 215; *Platt v. Stewart*, 13 Blatchf. 481, 495; *Newell v. Warner*, 44 Barb. 258. But see *Patterson v. Gillies*, 64 Barb. 563; *Dillingham v. Bolt*, 37 N. Y. 198; *Ely v. Carney*, 19 N. Y. 496. If the statement contains a reference to another document which is filed with the statement, the statements in both papers will be taken together as a sufficient compliance with the law. *Beers v. Waterbury*, 8 Bosw. 396; *Miller v. Jones*, 15 Nat. Bank Rep. 150; *Briggs v. Mette*, 42 Mich. 12.

<sup>3</sup> *Boyd v. Becky*, 29 Ala. 703; *Hicks v. Williams*, 17 Barb. 523; *Wallen v. Cossman*, 45 Mich. 333; *Powers v. Freeman*, 2 Lans. 127.

<sup>4</sup> *Brigham v. Weaver*, 6 Cush. 298; *Whitney v. Heywood*, 5 Cush. 82; *Holt v. Benrick*, 11 N. H. 285; *Hicks v. Williams*, 17 Barb. 523; *Elsou*

gagors are residents of the State, and others are non-residents, both provisions of the law have to be complied with, and the mortgage recorded or filed, not only where the mortgagors reside, but also where the goods are situated.<sup>1</sup> The statutes generally provide for this alternative recording, where the mortgagors are residents and non-residents, but if a statute provides for the recording or filing of a chattel mortgage only in the county in which the mortgagor resides, there cannot be in that State any effectual record of a chattel mortgage, where the mortgagor is a non-resident.<sup>2</sup> The recording law also generally provides that a mortgage to be valid as against creditors and purchasers must be recorded within a specified time after execution, and when that is the provision, the record is ineffectual for all purposes if not made within the statutory period.<sup>3</sup> But where the statute simply provides that the mortgage shall not be enforceable against subsequent purchasers and creditors, who acquire interests in the mortgaged property after the execution of the mortgage and before recording, unless it be filed for record within the statutory period, the failure to record within that time will only have the effect of post-

*v. Banier*, 56 Miss. 394; *Bevans v. Bolton*, 31 Mo. 437; *Harris v. Jones*, 83 N. C. 317; *Offutt v. Flagg*, 10 N. H. 46; *Feust v. Rowell*, 62 Mo. 524; *Smith v. McLean*, 24 Iowa, 322; *Simpson v. Morris*, 8 N. C. 411; *Pease v. Odenkirchen*, 42 Conn. 415; *Barrows v. Turner*, 50 Me. 127.

<sup>1</sup> *De Courcey v. Collins*, 21 N. J. Eq. 357; affirming *s. c.* 19 N. J. Eq. 115, and the mortgage must be recorded in every county in which a mortgager resides. *Stewart v. Platt*, 101 U. S. 731; *Rich v. Roberts*, 48 Me. 348; *s. c.* 50 Me. 395; *Morrill v. Sanford*, 49 Me. 566; *Briggs v. Leitelt*, 41 Mich. 79.

<sup>2</sup> *Smith v. Moore*, 11 N. H. 55.

<sup>3</sup> *Chenyworth v. Dally*, 7 Ind. 284; *McCord v. Cooper*, 30 Ind. 9; *McTaggart v. Rose*, 14 Ind. 230; *Lockwood v. Slevin*, 26 Ind. 124; *Sidew v. Bible*, 43 Ind. 230. The same requirement is generally made in regard to re-filing. The mortgage must be refiled within the given period, in order to be effectual, neither before nor afterwards. *Newell v. Warner*, 41 Barb. 258; *Mitchie v. Townsend*, 2 Sandf. 299; *National Bank v. Sprague*, 20 N. J. Eq. 13.

poning the lien of the mortgage to the claims of the purchasers and creditors mentioned.<sup>1</sup> If the statute requires the clerk to minute in his book and on the mortgage the time when the mortgage is received, there is no effectual record of the mortgage if he does not make these minutes, as long as the mortgage is not yet recorded.<sup>2</sup> The general rule is that the notice by record is secured from the time that the mortgage is left with the proper officer for record,<sup>3</sup> and the mortgagee's rights are in no wise affected by the officer's neglect of duty in making the record.<sup>4</sup> The index is no part of the record, unless the recording act expressly required it as a part of the record; and hence, any mistake in the index or failure to index the mortgage does not affect the validity of the record.<sup>5</sup>

The recording law generally provides specially what instruments shall be received for record, and in order that the record may furnish constructive notice of any recorded

<sup>1</sup> *Hardaway v. Semmer*, 25 Ga. 305; *Johnson v. Patterson*, 2 Woods, 448. The same provision is found in other States.

<sup>2</sup> *Handly v. Howe*, 22 Me. 560; *Holmes v. Sprowl*, 81 Me. 73; *Head v. Goodwin*, 37 Me. 181; *Jones v. Parker*, 73 Me. 248; *McLaren v. Thompson*, 40 Me. 284. But see *Smith v. Waggoner*, 50 Wis. 155, where a similar statutory provision was held to be directory, and a failure to comply with it did not invalidate the record.

<sup>3</sup> *Craig v. Dimock*, 47 Ill. 303; *Miller v. Whitson*, 40 Mo. 97; *Jordan v. Farnsworth*, 15 Gray, 517; *McGregor v. Hall*, 3 St. & P. 397; *Wilson v. Leslie*, 20 Ohio, 161; *Gorham v. Summers*, 25 Minn. 81; *Parker v. Palmer*, 13 R. I. 359.

<sup>4</sup> *People v. Bristol*, 35 Mich. 28; *Turner v. McFee*, 61 Ala. 468; *Neele v. Berryhill*, 4 How. Pr. 16; *Dodge v. Potter*, 18 Barb. 193; *Dikerman v. Puckhafer*, 1 Abb. Pr. (N. S.) 32.

<sup>5</sup> *Chase v. Bennett*, 58 N. H. 428; *Jordan v. Hamilton Co. Bank*, 11 Neb. 499; *Dikerman v. Puckhafer*, 1 Daly, 489; 1 Abb. Pr. (N. S.) 32. See also *Curtis v. Lyman*, 24 Vt. 338; *Dodge v. Potter*, 18 Barb. 193; *Mutual Life Ins. Co. v. Dake*, 1 Abb. N. C. 361; *Green v. Corrington*, 16 Ohio St. 548; *Throckmorton v. Price*, 28 Tex. 605; *Bishop v. Schneider*, 46 Mo. 472; *Shell v. Stein*, 76 Pa. St. 398. *Contra*, *Gwyn v. Turner*, 18 Iowa, 1; *Walley v. Small*, 25 Iowa, 184; *Pungle v. Dunn*, 37 Wis. 449.



instrument, the instrument must be one that can under the law be admitted to the record. The record does not furnish constructive notice of one which has been improperly or unlawfully admitted to the record. Thus, if the recording act requires the mortgage to be acknowledged before being admitted to record, the record of an unacknowledged or improperly acknowledged mortgage is ineffectual to protect the rights of the mortgagee.<sup>1</sup>

If the instrument is a mortgage of chattels it can be recorded under the provision for the record of such mortgages, whatever may be the unusual form of the instrument, and a deed, absolute on its face, if in fact intended to be a mortgage, will be admitted to this record as a mortgage.<sup>2</sup> The record of such a deed is valid, although the recording act requires the separate defeasance, if there be one, to be recorded, in order to make the record effectual, provided, of course, that the defeasance has never been reduced to writing.<sup>3</sup>

If the mortgage covers both real and personal property, the mortgage should be recorded both as a real estate mortgage and as a chattel mortgage.<sup>4</sup> But this double record is not necessary unless the recording law requires this expressly or by necessary implication.<sup>5</sup>

<sup>1</sup> *Hill v. Gilman*, 39 N. H. 88; *Becker v. Anderson*, 11 Neb. 498; *Frank v. Miner*, 50 Ill. 444; *McDowell v. Stewart*, 83 Ill. 538; *Selking v. Hebel*, 1 Mo. App. 840; *Koplin v. Anderson*, 88 Ill. 120; *Porter v. Dement*, 35 Ill. 478; *Cook v. Hager*, 3 Col. 683; *Balley v. Godfrey*, 54 Ill. 507; *Nichols v. Hampton*, 46 Ga. 253; *Darst v. Gale*, 83 Ill. 136; *Beaman v. Whitney*, 20 Me. 413; *Wilson v. Traer*, 20 Iowa, 231; *Hammers v. Dole*, 61 Ill. 307; *Flynn v. Hathaway*, 65 Ill. 462; *Bullock v. Narrott*, 49 Ill. 62; *Durfee v. Grimmell*, 69 Ill. 371.

<sup>2</sup> *Bird v. Wilkinson*, 4 Leigh, 266; *Dukes v. Jones*, 6 Jones (N. C.) L. 14; *Kuhn v. Graves*, 9 Iowa, 303; *Sanders v. Pepoon*, 4 Fla. 465; *Shaw v. Wilshire*, 65 Me. 485; overruling *Knight v. Nichols*, 34 Me. 208.

<sup>3</sup> *Ing v. Brown*, 8 Md. Ch. 521; *Gaither v. Mumford*, Taylor (N. C.), 167.

<sup>4</sup> *Stewart v. Beale*, 7 Hun, 405; s. c. 68 N. Y. 629.

<sup>5</sup> *Anthony v. Butler*, 13 Pet. 423.

As a general rule, the recording law does not provide for the recording of any other but mortgages of goods and other tangible property. The law does not apply to mortgages of choses in action.<sup>1</sup> Nor does the law apply to the mortgage of the capital stock of a corporation,<sup>2</sup> nor to the mortgage of a legacy.<sup>3</sup>

If a schedule is made a part of the mortgage, the failure to record it along with the mortgage will invalidate the record of the mortgage.<sup>4</sup> But the schedule need not be recorded, if it is merely referred to in the mortgage, but it is not made a part of it.<sup>5</sup> It is also unnecessary to record the written agreement, to secure the performance of which the mortgage was given.<sup>6</sup>

Finally, while it may be stated generally that the validity of the mortgage of personal property will be determined by the law of the place of contract, and a change in the residence of the mortgagor or in the location of the property will not subject the question to the law of the latter place,<sup>7</sup>

<sup>1</sup> *Kirkland v. Brune*, 31 Gratt. 126; *Newby v. Hill*, 2 Met. (Ky.) 530; *Bank of United States v. Huth*, 4 B. Mon. 423, 448; *Vanmeter v. McFaddin*, 8 B. Mon. 435; *Monroe v. Hamilton*, 60 Ala. 233; *Bacon v. Bonham*, 27 N. J. Eq. 209; *Windsor v. McLellan*, 2 Story, 492; *Marsh v. Woodbury*, 1 Met. 436.

<sup>2</sup> *Williamson v. N. J. South. R. R. Co.*, 26 N. J. Eq. 311; *Rowland v. Plummer*, 60 Ala. 182.

<sup>3</sup> *Bacon v. Bonham*, 27 N. J. Eq. 209.

<sup>4</sup> *Sawyer v. Pennell*, 19 Me. 167.

<sup>5</sup> *Chapin v. Cran*, 40 Me. 561.

<sup>6</sup> *Bryan v. Gordon*, 11 Mich. 531; *Shuler v. Boutwell*, 18 Hun, 171.

<sup>7</sup> *Jeter v. Fellowes*, 32 Pa. St. 465; *Wilson v. Carson*, 12 Md. 54; *Kanaga v. Taylor*, 7 Ohio St. 134; *Ryan v. Clanton*, 3 Strobb. L. 411; *Feust v. Rowell*, 62 Mo. 524; *Ferguson v. Clifford*, 87 N. H. 86; *Offutt v. Flagg*, 10 N. H. 50; *Vanbuskirk v. Hartford F. Ins. Co.*, 14 Conn. 583; *Martin v. Hill*, 12 Barb. 631; *Ames Iron Works v. Warren*, 76 Ind. 512; *Edgerly v. Bush*, 81 N. Y. 199; *Blystone v. Burgett*, 10 Ind. 28; *Simms v. McDee*, 25 Iowa, 341; *Smith v. McLean*, 24 Iowa, 322; *Arnold v. Potter*, 22 Iowa, 194; *Hall v. Pillow*, 31 Ark. 32; *Beall v. Williamson*, 14 Ala. 55; *Barker v. Stacy*, 25 Miss. 471; *R. I. Central Bank v. Danforth*, 14 Gray, 128; *Langworthy v. Little*, 12 Cush. 109; *Cushman v. Luther*, 53

if the mortgage was executed in a State other than that in which the property was situated, the validity of the mortgage is determined by the law of the place where the property was situated.<sup>1</sup>

§ 240. **The Effect of recording a mortgage.** — The object of the recording acts is to furnish to the parties the opportunity of leaving the mortgaged property in the hands of the mortgagor, without invalidating the mortgage as against the subsequent purchasers and attaching creditors of the mortgagor, the common-law rule being that the retention of the possession by the mortgagor was presumptive evidence of fraud. Hence it is only required to record the mortgage, where the mortgagor desires to retain the possession of the mortgaged property, and the mortgage is still enforceable against subsequent purchasers and creditors, although unrecorded, if the possession has been transferred to the mortgagee before some third person has acquired an opposing interest in the property.<sup>2</sup> In a few of the States, the statute does not make the recording of the mortgage an equivalent of a delivery of the pos-

N. H. 562; *Nichols v. Mase*, 25 Hun, 640; *Clark v. Tucker*, 2 Sandf. 157; *Tyler v. Strang*, 21 Barb. 198; *Bank of United States v. Lee*, 13 Pet. 108.

<sup>1</sup> *Clark v. Tarbell*, 58 N. H. 88; *Green v. Van Buskirk*, 7 Wall. 139; *Martin v. Potter*, 34 Vt. 87; *Gullander v. Howell*, 35 N. Y. 657; *Golden v. Cockril*, 1 Kan. 259; *Whitman v. Conner*, 40 N. Y. Sup. Ct. 339; *Rice v. Courtis*, 32 Vt. 460; *Hardaway v. Semmes*, 38 Ala. 657. See *Denny v. Faulkner*, 22 Kan. 89; and *contra*, *Runyon v. Groshon*, 12 N. J. Eq. 86; *Blystone v. Burgett*, 10 Ind. 28; *Ames Iron Works v. Warren*, 76 Ind. 512.

<sup>2</sup> *Fromme v. Jones*, 13 Iowa, 474; *Miller v. Whitson*, 40 Mo. 97; *Morrill v. Sanford*, 49 Me. 566; *Harrington v. Brittan*, 23 Wis. 541; *Donaldson v. Johnson*, 2 Claud. (Wis.) 160; *Cotton v. Marsh*, 3 Wis. 221; *Bullock v. Williams*, 16 Pick. 33; *Forbes v. Parker*, 16 Pick. 462; *Crooks v. Stuart*, 2 McCrary, 13; *Robinson v. Elliott*, 22 Wall. 513; *Feust v. Rowell*, 62 Mo. 524. See *ante*, §239. See, also, to same effect, *Coles v. Clark*, 3 Cush. 399; *Cooper v. Brock*, 41 Mich. 488; *Morrow v. Reed*, 30 Wis. 81.

session in rebutting the legal presumption of fraud, arising from the retention of the possession by the mortgagor; but simply requires the mortgage to be recorded in order to permit the still existing presumption of fraud to be rebutted by evidence of good faith. The statute simply "adds another to the grounds on which a mortgage of personal chattels shall be void."<sup>1</sup>

But even though the chattel mortgage be not recorded and the possession of the property retained by the mortgagor, yet the mortgage is not absolutely void. It may still be enforced between the parties, and as against all others who do not come within the definition of attaching creditors and *bona fide* purchasers for value and without notice of the prior mortgage.<sup>2</sup> The failure to record the mortgage or to take possession of the mortgaged goods, does not prevent the mortgagee from acquiring title to the goods. He is simply estopped from setting up his really superior title against a subsequent purchaser or attaching creditor.<sup>3</sup> The mortgage is valid between the parties to it,

<sup>1</sup> Wood v. Lowry, 17 Wend, 492; Horton v. Williams, 21 Minn. 187; Marsh v. Burley, 13 Neb. (1882) 261; Pyle v. Warren, 2 Neb. 241; Brunswick v. McClay, 7 Neb. 137; Turner v. Killian, 12 Neb. 580.

<sup>2</sup> Johnson v. Jeffries, 30 Mo. 423; Machette v. Wanless, 2 Col. 169; Clagett v. Salmon, 5 G. & J. 314; Hackett v. Manlove, 14 Cal. 85; Williamson v. N. J. South. R. R. Co., 26 N. J. Eq. 398; Smith v. Moore, 11 N. H. 55; Wilson v. Leslie, 20 Ohio, 161; Kilbourne v. Fay, 29 Ohio St. 264; McTaggart v. Rose, 14 Ind. 230; Badger v. Batavia Paper Mfg. Co., 70 Ill. 302; Porter v. Dement, 35 Ill. 478; Forest v. Tinkham, 29 Ill. 141; Fuller v. Paige, 26 Ill. 358; Hudson v. Warner, 2 Har. & G. 415; Westcott v. Gun, 4 Duer, 107; Hayman v. Jones, 7 Hun, 238; Beeman v. Lawton, 37 Me. 543; Frank v. Miner, 50 Ill. 444; Griffin v. Wertz, 2 Bradw. 487; Davis v. Ranson, 26 Ill. 100; Lemay v. Williams, 32 Ark. 166; Hall v. Snowhill, 14 N. J. L. 8; Stewart v. Platt, 101 U. S. 731; Sawyer v. Turpin, 91 U. S. 114; Winsor v. McLellan, 2 Story, 492; Smith v. Acker, 23 Wend. 653; Stephenson v. Browning, 48 Ill. 73; Gaff v. Harding, 48 Ill. 148.

<sup>3</sup> Pratt v. Harlow, 16 Gray, 379; Moses v. Walker, 2 Hilt. 536; Johnson v. Jeffries, 30 Mo. 423; Brackett v. Bullard, 12 Met. 308; Hayman v. Jones, 7 Hun, 238.

even though it is actually fraudulent as to the mortgagor's creditors.<sup>1</sup>

The unrecorded mortgage may likewise be enforced against the personal representatives of the mortgagor,<sup>2</sup> although as against creditors of the deceased, for whose benefit, primarily, the personal representatives may be said to have acquired the personal property of the deceased debtor, the unrecorded mortgage has been held to be invalid.<sup>3</sup>

The general rule is that an unrecorded mortgage is valid against creditors, as long as they do not levy on, or attach, the mortgaged property, where the mortgage has been executed in good faith and for a valid debt.<sup>4</sup> But there are some authorities, which maintain that such a mortgage is invalid as against a creditor, whose claim has accrued after execution of the mortgage, and before recording or filing.<sup>5</sup>

Whether the unrecorded mortgage can be enforced against the general creditors through the voluntary assignee, or assignee in bankruptcy, who takes and holds the property of the debt in trust for his creditors, is doubtful, the courts having decided this question, both in the affirmative<sup>6</sup>

<sup>1</sup> *Brown v. Webb*, 20 Ohio, 339; *Gooding v. Riley*, 50 N. H. 406; *Tremper v. Barton*, 18 Ohio, 418; *Andrews v. Marshall*, 48 Me. 26.

<sup>2</sup> *Griffin v. Wertz*, 2 Bradw. 487; *Gill v. Pinney*, 12 Ohio St. 38.

<sup>3</sup> *Kilbourne v. Fay*, 29 Ohio St. 264; *Becker v. Anderson*, 11 Neb. 498.

<sup>4</sup> See cases cited *supra*, and, also, *Stewart v. Beale*, 7 Hun, 405; *s. c.* 68 N. Y. 629; *Jones v. Graham*, 77 N. Y. 628; *Kennedy v. Nat. Union Bank*, 28 Hun, 494; *Ransom v. Schmela*, 18 Neb. (1882) 73; *Cameron v. Marvin*, 26 Kan. 612, 627.

<sup>5</sup> *Thompson v. VanVechten*, 27 N. Y. 568; *Fraser v. Gilbert*, 11 Hun, 634; *Brackett v. Harvey*, 25 Hun, 502.

<sup>6</sup> *Mitford v. Mitford*, 9 Ves. 87; *Hanes v. Tiffany*, 25 Ohio St. 549; *Sherrington v. Yates*, 12 M. & W. 835; *Brown v. Heathcote*, 1 Atk. 160; *Winsor v. McLellan*, 2 Story, 492; *Fletcher v. Morey*, 2 Story, 555; *Mitchell v. Winslow*, 2 Story, 630; *Scott v. Alford*, 53 Tex. 87; *In re Collins*, 8 Ben. 59; *Curry v. McCauley*, 11 Fed. Rep. 365; *Nat. Shoe & Leather Bank v. Small*, 7 Fed. Rep. 837; *Platt v. Preston*, 3 Fed. Rep. 394; *Goddard v. Weaver*, 1 Woods, 257, 260; *In re Wynne*, 4 Nat. Bank Rep. 23; *Coggeshall v. Potter*, 4 Nat. Bank Rep. 73; *In re Griffiths*, 1

and in the negative.<sup>1</sup> The decisions in the negative rest their opinion on the doctrine that the general creditors acquire a lien on the property of the debtor in consequence of its transfer to the assignee. The better opinion seems to be that, if the mortgage is recorded, or the possession of the goods taken by the mortgagee, before the general creditors have become special creditors by judicial proceedings of some sort, the mortgage is valid, and the rights of the mortgagee amply protected against the adverse claims of the general creditors.<sup>2</sup>

It was supposed that there is no inequality of equity between two unrecorded mortgages, so that they would be enforced in the order of their execution.<sup>3</sup> But the better opinion is that the second mortgage will have priority over

Lowell, 431; Hauselt v. Harrison, 105 U. S. 401, 406; Stewart v. Platt, 101 U. S. 781.

<sup>1</sup> See *Re Werner*, 5 Dill. 119; *Re Gurney*, 7 Biss. 414; *Barker v. Smith*, 12 N. Bank Rep. 474; *In re Collins*, 12 Blatchf. 548; *Platt v. Stewart*, 13 Blatchf. 481; *Moore v. Young*, 4 Biss. 128; *Brock v. Terrell*, 2 N. Bank Rep. 648; *Goodrich v. Michael*, 3 Colo. 77; *Denny v. Lincoln*, 13 Met. 200; *Southard v. Benner*, 73 N. Y. 424; *Lockwood v. Slevin*, 26 Ind. 124; *Bingham v. Jordan*, 1 Allen, 373; *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174, 180; *Allen v. Massey*, 4 N. Bank Rep. 248; *Bank of Leavenworth v. Hunt*, 11 Wall. 391 (in this case, however, the mortgage was fraudulent); *In re Eldridge*, 2 Biss. 362; *Re Leland*, 10 Blatchf. 503; *Miller v. Jones*, 15 N. Bank, 150. See *Putnam v. Reynolds*, 44 Mich. 113.

<sup>2</sup> *Mitchell v. Black*, 6 Gray, 100; *Matthews v. Westphal*, 1 McCrary, 446; *Anibal v. Heacock*, 2 Fed. Rep. 169; *Sawyer v. Turpin*, 91 U. S. 114; *s. c.* 13 N. Bank Rep. 271; *Cook v. Tullis*, 18 Wall. 332, 340; *Stevens v. Blanchard*, 3 Cush. 169; *National Shoe & Leather Bank v. Small*, 7 Fed. Rep. 837; *Clark v. Iselin*, 21 Wall. 360; *Watson v. Taylor*, 21 Wall. 373; *Burnhisel v. Firman*, 22 Wall. 170. But see, *contra*, *Re Eldridge*, 2 Biss. 362; *Harvey v. Crane*, 2 Biss. 496; *In re Manly*, 3 N. Bank Rep. 291; *Bean v. Amsink*, 8 N. Bank Rep. 228; *Leaver v. Spink*, 8 N. Bank Rep. 218; *In re Morrill*, 8 N. Bank, 117; *Harris v. Exchange Nat. Bank*, 4 Dill. 133; *Foster v. Hackley*, 2 N. Bank Rep. 406; *In re Hussman*, 2 N. Bank Rep. 487, in which it is held that taking possession of the goods on the eve of the mortgagor's bankruptcy, operated as a preference to the mortgagee, which violated the bankrupt law in that respect.

<sup>3</sup> *Tiffany v. Warren*, 37 Barb. 571; 24 How. Pr. 293.

the first, if the second mortgagee took his mortgage without notice of the first; his failure to record his mortgage being no reason why he should lose the priority which he had gained by the failure of the first mortgagee to record his mortgage.<sup>1</sup>

Where the mortgaged property is sold, and a purchaser resists the enforcement of the unrecorded mortgage, to be successful in his opposition to the mortgage, he must show that he has actually paid and not merely that he had promised to pay a valuable and substantial consideration for the goods.<sup>2</sup> And, whether the person who attacks the validity of the unrecorded mortgage be a creditor or purchaser, the general rule requires that he must acquire his interest in the mortgaged property without actual notice of the prior unrecorded mortgage,<sup>3</sup> or without knowledge of such collateral facts as

<sup>1</sup> *De Courcey v. Collins*, 21 N. J. Eq. 357.

<sup>2</sup> *Kohl v. Lynn*, 34 Mich. 360; *Harris v. Norton*, 16 Barb. 264; *Cummings v. Tovey*, 39 Iowa, 195; *Kessey v. McHenry*, 54 Iowa, 187; *Merrill v. Dawson*, Hemp. 563; *Patten v. Moore*, 32 N. H. 382.

<sup>3</sup> As to purchasers, see *Paine v. Mason*, 7 Ohio St. 198; *Simons v. Pierce*, 16 Ohio St. 215; *Wetherell v. Spencer*, 3 Mich. 123; *Shuler v. Boutwell*, 18 Hun, 171; *Sanger v. Eastwood*, 19 Wend. 514; *Tiffany v. Warren*, 37 Barb. 571; *Lewis v. Palmer*, 28 N. Y. 271; *Meech v. Patchin*, 14 N. Y. 71; *Gooding v. Riley*, 50 N. H. 400; *Clark v. Tarbell*, 57 N. H. 328; *Low v. Pettingill*, 12 N. H. 337; *National Bank v. Sprague*, 21 N. J. Eq. 530; *Allen v. McCalla*, 25 Iowa, 464; *Crawford v. Burton*, 6 Iowa, 476; *Campbell v. Leonard*, 11 Iowa, 489; *Forbert v. Hayden*, 11 Iowa, 435; *Smith v. Zurcher*, 9 Ala. 208; *Steele v. Adams*, 21 Ala. 534; *Coble v. Nonemaker*, 78 Pa. St. 501; *Hudson v. Warner*, 2 Har. & G. 415; *Boyd v. Beck*, 29 Ala. 703; *Fromme v. Jones*, 13 Iowa, 474; *Kuhn v. Graves*, 9 Iowa, 303; *McGavran v. Haupt*, 9 Iowa, 83; *Sage v. Browning*, 57 Ill. 217; *Frank v. Miner*, 50 Ill. 444; *Miller v. Bryan*, 3 Iowa, 58; *Williamson v. N. J. South. R. R. Co.*, 26 N. J. Eq. 398; *McDowell v. Stewart*, 83 Ill. 538; *Stowe v. Meserve*, 13 N. H. 46; *Tucker v. Tilton*, 55 N. H. 223; *Lemen v. Robinson*, 59 Ill. 115; *Patten v. Moore*, 32 N. H. 382; *Gildersleeve v. Landon*, 73 N. Y. 609; *Hill v. Beebe*, 14 N. Y. 71; *Lewis v. Palmer*, 28 N. Y. 271; *Gould v. Marsh*, 4 T. & C. 128; *Gregory v. Thomas*, 20 Wend. 17; *Paulus v. Nunn*, 48 Mich. (1882) 191; *Doyle v. Stevens*, 4 Mich. 87; *Day v. Munson*, 14 Ohio St. 488. As applied to creditors, see *McGavran v. Haupt*, 9 Iowa, 83; *Cragin v. Carmichael*, 2 Dill. 519; *Seevers v.*

would put a reasonably prudent man upon his inquiry.<sup>1</sup> But in some of the States, the statutes are held to pronounce the mortgage void even against one who acquires his subsequent interest in the mortgaged property with notice of the unrecorded mortgage.<sup>2</sup> The same point is made in New York and New Jersey as to attaching creditors, the unrecorded mortgage being void as to them, notwithstanding they had notice of the mortgage, although in these States notice on the part of the subsequent purchaser destroys his superior equity over the prior unrecorded mortgage.<sup>3</sup>

§ 241. **The right of possession of the mortgaged chattels.**— Except where the parties have expressly provided for the contrary, the general rule of law, in conformity with the common-law notion of the character of a chattel mortgage, is that the mortgagee is entitled to the possession of the mortgaged property immediately after the execution and delivery of the mortgage.<sup>4</sup> Not only is the

Delashmutt, 11 Iowa, 174; *Kessey v. McHenry*, 54 Iowa, 187; *Crooks v. Stuart*, 2 McCrary, 13; *Allen v. McCalla*, 25 Iowa, 464.

<sup>1</sup> *Allen v. McCalla*, 25 Iowa, 464. But see *Foster v. Gillespie*, 68 Mo. 643.

<sup>2</sup> *Bingham v. Jordan*, 1 Allen, 373; *Travis v. Bishop*, 13 Met. 304; *Garland v. Plummer*, 72 Me. 397; *Sheldon v. Conner*, 48 Me. 584; *Rich v. Roberts*, 48 Me. 548; *Bryson v. Phenix*, 18 Mo. 18; *Selking v. Hebel*, 1 Mo. App. 340; *Bevans v. Bolton*, 31 Mo. 437; *Wilson v. Milligan*, 75 Mo. 41; *Gassner v. Patterson*, 23 Cal. 299; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160; *Moore v. Young*, 4 Biss. 128; *Kennedy v. Shaw*, 38 Ind. 474.

<sup>3</sup> *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484; *Stevens v. Buffalo & N. Y. City R. R. Co.*, 31 Barb. 590; *Saysie v. Hewes*, 32 N. J. Eq. 652, 656; *Williamson v. N. J. South. R. R. Co.*, 29 N. J. Eq. 311, 336; *s. c.* 28 N. J. Eq. 277.

<sup>4</sup> *Brackett v. Bullard*, 12 Met. 308; *Pickard v. Low*, 15 Me. 48; *Flanders v. Barstow*, 18 Me. 357; *Ramsdell v. Tewksbury*, 73 Me. 197; *Holmes v. Sprowl*, 31 Me. 73; *Woodman v. Chesley*, 39 Me. 45; *Broadhead v. McKay*, 46 Ind. 595; *Johnson v. Simpson*, 77 Ind. 412; *Clark v. Whittaker*, 18 Conn. 543; *Ellington v. Charleston*, 51 Ala. 166; *Ross v. Ross*, 21 Ala. 322; *Robinson v. Campbell*, 8 Mo. 365; *McGuire v. Benoit*, 33 Md. 181; *Wilson v. Brannan*, 27 Cal. 258; *Burdick v. McVanner*, 2 Den. 170; *Smith v. Acker*, 23 Wend. 654; *Wilner v. Morrell*, 8 J. & S.



mortgagee recognized as being entitled to possession as between the parties to the mortgage, but, also, as to third parties, so that if the property falls into the possession of third persons, as well as when the mortgagor has the possession, the mortgagee may institute his action of trover or replevin, for the wrongful conversion of the mortgaged property.<sup>1</sup> But if the mortgage contains a stipulation that the mortgagor shall retain the right of possession until default or foreclosure, the mortgagor being thus entitled to possession, the mortgagee could not maintain any action for the conversion of the goods. The mortgagor must in that case bring the action.<sup>2</sup> And where the mortgagor is

222; *Chadwick v. Lamb*, 29 Barb. 518; *Ferguson v. Clifford*, 37 N. H. 86; *Miller v. Pancoast*, 29 N. J. L. 250; *Whisler v. Roberts*, 19 Ill. 374; *Frank v. Miner*, 50 Ill. 444; *Constant v. Matteson*, 22 Ill. 546; *Hamlyn v. Boulton*, 15 Kan. 376; *Thornton v. Gilman*, 4 Smed. & M. 153; *Robinson v. Fitch*, 26 Ohio St. 659; *Bean v. Barney*, 10 Iowa, 498; *Bates v. Wiles*, 1 Handy (Ohio), 532; *Wolfley v. Rising*, 12 Kan. 535; *Kannaday v. McCarrson*, 18 Ark. 166; *Chlpron v. Feikert*, 68 Ill. 294; *Nelson v. Wheelock*, 46 Ill. 25; *Sanderson v. Price*, 1 Zab. 637; *Leach v. Kimball*, 34 N. H. 568; *Mattison v. Baucus*, 1 N. Y. 295; *Shuart v. Taylor*, 7 How. Pr. 251; *Patchin v. Pierce*, 12 Wend. 62; *Fuller v. Acker*, 1 Hill, 473, 475; *Langdon v. Buel*, 9 Wend. 80, 83; *Wildman v. Radenaker*, 20 Cal. 615; *Jamieson v. Bruce*, 6 G. & J. 72; *Williams v. Rorer*, 7 Mo. 556; *Brown v. Lipscomb*, 9 Port. 475; *Pease v. Odenkirchen*, 42 Conn. 415; *Case v. Winship*, 4 Blackf. 425; *Stewart v. Hanson*, 35 Me. 506; *Pierce v. Stevens*, 30 Me. 184; *Holly v. Huggefurd*, 8 Pick. 78; *Coles v. Clark*, 3 Cush. 899; *Hall v. Sampson*, 35 N. Y. 274; *Boise v. Knox*, 10 Me. 40; *Landon v. Emmons*, 97 Mass. 37.

<sup>1</sup> *Frisbee v. Langworthy*, 11 Wis. 375; *Lewis v. D'Arcy*, 71 Ill. 648; *Russell v. Butterfield*, 21 Wend. 300; *Pickard v. Low*, 15 Me. 48; *Quinn v. Schmidt*, 91 Ill. 84; *Brown v. Cook*, 3 E. D. Smith, 123; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *Cotton v. Marsh*, 3 Wis. 221; *Bates v. Wilbur*, 10 Wis. 415; *Montgomery v. Kerr*, 1 Hill (S. C.), 291; *Cutler v. Copeland*, 18 Me. 127; *Ashley v. Wright*, 19 Ohio St. 291; *Skiff v. Solace*, 23 Vt. 279; *Chadwick v. Lamb*, 29 Barb. 518.

<sup>2</sup> *Curd v. Wunder*, 5 Ohio St. 92; *Hathaway v. Brayman*, 42 N. Y. 322; *Calkins v. Clement*, 54 Vt. 635; *Simmons v. Jenkins*, 76 Ill. 479; *Fenn v. Bittleston*, 21 L. J. (N. s.) Ex. 41; *Hamilton v. Mitchell*, 6 Blackf. 181; *Shinners v. Brill*, 38 Wis. 648; *McLeod v. Bernhold*, 32 Ark. 671; *Tallmann v. Jones*, 13 Kan. 438.

entitled to the possession, the mortgagee is liable to trespass or trover for disturbing the mortgagor's possession.<sup>1</sup>

In many of the States the common-law rule, that the mortgagee is immediately entitled to the possession of the mortgaged property, is denied and instead thereof the right to possession is conceded to the mortgagor, until foreclosure,<sup>2</sup> or until default in payment.<sup>3</sup>

Where the mortgage provides for the retention of the possession of the goods by the mortgagor, it usually states the conditions and circumstances upon which the mortgagee is to take possession, and of course these stipulations must determine the mortgagee's right to the possession. The provisions are various, providing for the mortgagee to take possession on default in payment of principal or interest, or it may be taken by him only when he intends to foreclose the mortgage. Or the mortgage may provide that the mortgagee shall take possession whenever he considers his security unsafe by reason of the mortgagor's possession.<sup>4</sup>

<sup>1</sup> *Ford v. Ransom*, 39 How. Pr. 429; *s. c.* 8 Abb. Pr. (N. S.) 416; *Pierce v. Hasbrouck*, 49 Ill. 23; *Russell v. Butterfield*, 21 Wend. 300; *Brink v. Freoff*, 44 Mich. 69; *Jackson v. Hall*, 84 N. C. 489; *Spaulding v. Barnes*, 4 Gray, 330; *Thornton v. Cochran*, 51 Ala. 415; *Mathews v. Fisk*, 64 Me. 101; *Saxton v. Williams*, 15 Wis. 292; *Blodgett v. Blodgett*, 48 Vt. 32; *Brown v. Phillips*, 3 Bush, 656; *Hall v. Sampson*, 35 N. Y. 27. But only the mortgagor, or some one having his title, can hold the mortgagee to account in such a case. Third persons, having not the title to the goods, cannot. *Goar v. Hurd*, 92 Ill. 315; *McConnell v. Scott*, 67 Ill. 274.

<sup>2</sup> *Kohl v. Lynn*, 34 Mich. 360; *Flanders v. Chamberlain*, 24 Mich. 305; *Cary v. Hewitt*, 26 Mich. 228; *Lucking v. Wesson*, 25 Mich. 443; *Baxter v. Spencer*, 33 Mich. 325; *People v. Bristol*, 35 Mich. 28; *Warner v. Beebe*, 47 Mich. 485.

<sup>3</sup> *Sheble v. Curd*, 56 Mo. 437; *Barnett v. Timberlake*, 57 Mo. 499, overruling earlier cases; *Buck v. Payne*, 52 Miss. 271; *Elson v. Barrier*, 56 Miss. 394. But see *Bowman v. Roberts*, 58 Miss. 126, where it is held that the trustee in a deed of trust is not entitled under the Mississippi statute to the possession of the chattels, until the creditor has requested him to take possession for the purpose of foreclosure.

<sup>4</sup> *Jamieson v. Bruce*, 6 G. & J. 72, 75; *Wells v. Chapman*, 59 Iowa, 658; *Hall v. Sampson*, 35 N. Y. 274; *Cline v. Libby*, 46 Wis. 123; *Rus-*

Where the mortgagee is authorized to take possession whenever he shall consider his security unsafe in the hands of the mortgagor, he has the absolute power of determining when the contingency has arisen, and he is not required to give any reasons for his demand of possession. The courts cannot review his decision that the mortgagor's retention of possession renders his security unsafe.<sup>1</sup>

In the absence of express stipulations of this sort, the presumption is, where the mortgagor is given the right to possession, that the mortgagee can take possession on default in payment.<sup>2</sup>

The reservation of the right of possession to the mortgagor need not be express; it may be implied from provisions which determine the time when the mortgagee shall take possession,<sup>3</sup> or which provide for the mortgagor to keep the property in repair,<sup>4</sup> and the like. But the compliance with the provision must require the mortgagor's re-

sell v. Butterfield, 21 Wend. 300; St. Louis Drug Co. v. Robinson, 10 Mo. App. 588; Anderson v. Holmes, 14 S. C. 162; Adener v. Bible, 48 Ind. 230; National Guardian Ass. Co., ex parte, 10 Ch. D. 408; Prior v. White, 12 Ill. 261; Wilson v. Rountree, 72 Ill. 570; Fox v. Kitton, 19 Ill. 521; Beach v. Derby, 19 Ill. 617; Pike v. Colvin, 67 Ill. 227; Bailey v. Godfrey, 54 Ill. 507; Durfee v. Grinnell, 69 Ill. 371; Lewis v. D'Arcy, 71 Ill. 648; Jorgensen v. Tait, 26 Minn. 327; McGuire v. Benoit, 33 Md. 181; Laing v. Perrot, 48 Mich. 298.

<sup>1</sup> Werner v. Bergman, 28 Kan. 60; Braley v. Byrnes, 21 Minn. 433; Ebans v. Graham, 50 Wis. 450; Fox v. Kitton, 19 Ill. 519; Durfee v. Grinnell, 69 Ill. 371; Smith v. Post, 1 Hun, 516; Huebner v. Koebke, 42 Wis. 319; Cline v. Libby, 46 Wis. 123; Bailey v. Godfrey, 54 Ill. 507; Lewis v. D'Arcy, 71 Ill. 646; Roy v. Goings, 96 Ill. 361; Frisbee v. Langworthy, 11 Wis. 375; Welch v. Sackett, 12 Wis. 243; Grove v. Wise, 39 Mich. 161; Harvey v. McAdams, 32 Mich. 472; Huggans v. Fryer, 1 Lans. 276; Boice v. Boice, 27 Minn. 371; Botsford v. Murphy, 47 Mich. 536. But see, *contra*, Furlong v. Cox, 77 Ill. 293; Davenport v. Ledger, 80 Ill. 574.

<sup>2</sup> See Robinson v. Fitch, 26 Ohio St. 659; Lindeman v. Ingham, 36 Ohio St. 1, 9.

<sup>3</sup> Hall v. Sampson, 35 N. Y. 274; Hathaway v. Brayman, 42 N. Y. 322; Letcher v. Norton, 4 Scam. 575; Sherman v. Clark, 24 Minn. 37.

<sup>4</sup> Babcock v. McFarland, 43 Ill. 381.

tention of possession, in order that his right to possession may be implied therefrom.<sup>1</sup>

§ 242. **The right to profits.**— If the mortgagor is in possession of the mortgaged property, he is entitled to the profits and income, and he may appropriate them to his own use, unless the mortgage stipulates that they should be applied to the liquidation of the debt, when he can be made to account for them.<sup>2</sup> If the mortgagee is in possession, he is entitled to collect the profits, but he receives them in trust to apply them to the liquidation of the mortgaged debt and interest, and if there should be a surplus, then it must be held for the mortgagor. The mortgagee never has a personal right to the profits.

§ 243. **Mortgagor's right to sell the mortgaged property.**— Whatever may be the view taken of the character of the mortgagor's interest, it is transferable, *i.e.*, the mortgagor has the power to sell the mortgaged property, subject to the mortgage,<sup>3</sup> unless the power of sale has by an express provision of the mortgage been taken away altogether.<sup>4</sup> And while it is true that after breach of the condition, according to the common-law rules, the mortgagor has no legal estate in the property, and, therefore, has nothing which he can sell in law,<sup>5</sup> yet he still has

<sup>1</sup> *Ellington v. Charleston*, 51 Ala. 166; *Ferguson v. Thomas*, 26 Me. 499.

<sup>2</sup> *Stewart v. Fry*, 3 Ala. 573; *Graves v. Sayre*, 5 B. Mon. 390; *North v. Drayton*, Harper Ch. 34.

<sup>3</sup> *Chapman v. Hunt*, 13 N. J. Eq. 370; *Cadwell v. Pray*, 41 Mich. 307; *Davis v. Blume*, 1 Mont. 463; *Porter v. Parmly*, 34 N. Y. Supr. Ct. 398; *Hathaway v. Brayman*, 42 N. Y. 322; *Hammond v. Plimpton*, 30 Vt. 333; *McLaughlin v. Smith*, 45 Mich. 277; *Russell v. Fillmore*, 15 Vt. 130; *Daly v. Proetz*, 20 Minn. 411; *Mechanics' Building & Loan Assn. v. Conover*, 14 N. J. Eq. 219; *Arnold v. Stock*, 81 Ill. 407.

<sup>4</sup> See *Gage v. Whittier*, 17 N. H. 312; *Fisher v. Friedman*, 47 Iowa, 443.

<sup>5</sup> *Chapman v. Hunt*, 13 N. J. Eq. 370.

an equity of redemption which he may transfer not only to any one in general who wants to buy, but even to the mortgagee. The mortgagee may save the cost and trouble of foreclosure by buying in the mortgagor's equity of redemption. But such transactions between mortgagor and mortgagee are closely watched by courts of equity, and will avoid them if they have been procured from the mortgagor by fraud or undue influence.<sup>1</sup>

A chattel mortgage is very often given over a stock of goods of a merchant or tradesman, and the understanding of the parties is that the mortgagor shall remain in possession, and by continuing the business of selling goods, be enabled to pay off the debt. But in order to do this, the mortgagor must have the power to sell the goods in course of trade, not merely subject to the mortgagee's lien, but absolutely. Hence it is customary in such mortgages to give the mortgagor the power to sell, and when the mortgagor has this power, his purchasers get an absolute title to the goods free from the claims of the mortgagee, for the mortgagee in such a case has consented to the sale.<sup>2</sup> It is customary for the mortgage to contain an express grant of the power to sell. But this is not necessary to the existence of the power. Not only will a parol agreement between the parties, that the mortgagor shall have this power, in the absence of a statutory prohibition, be an effectual grant of power,<sup>3</sup> but it may also be inferred from other provisions, which mean nothing unless the power to

<sup>1</sup> *Locke v. Palmer*, 26 Ala. 312; *Goodman v. Pledger*, 14 Ala. 114; *McKinstry v. Conly*, 12 Ala. 678; *Phillip v. Hunter*, 22 Mo. 485; *Hackleman v. Goodman*, 75 Ind. 202.

<sup>2</sup> *Walker v. Clay*, 42 L. T. (N. S.) 369; *s. c.* 49 L. J. R. 660; *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177.

<sup>3</sup> *Pratt v. Maynard*, 116 Mass. 388; *Roberts v. Crawford*, 54 N. H. 532; *Gage v. Whittier*, 17 N. H. 312; *Flenniken v. Scruggs*, 15 S. C. 88; *Brandt v. Daniels*, 45 Ill. 453; *Carter v. Fately*, 67 Ind. 427; *Patrick v. Meserve*, 18 N. H. 300; *Stafford v. Whitcomb*, 8 Allen, 518.

sell is implied.<sup>1</sup> The mortgagee will also be estopped from denying the validity of the mortgagor's sale of the goods, if he knows of the sale and does not take steps to prevent it, and especially when he is present at the sale, without raising objections,<sup>2</sup> or he knowingly accepts the proceeds of sale in satisfaction of any part of the debt.<sup>3</sup> But when the mortgagor is given the power to sell the mortgaged property, the power is confined to sales in the ordinary course of business; and, unless the application of the power is extended by an express stipulation, the mortgagor cannot divest the mortgagee of his title to the goods by an extraordinary sale, such as a sale of the entire stock of goods, and a consequent cessation of the business.<sup>4</sup>

**§ 244. Mortgagor's power to create superior liens. —**

The general proposition is clear that the mortgagor cannot, by virtue of the right of possession, claim the right to subject the property to a lien which will have precedence over the mortgage. But if the mortgagor is authorized or required to do with the mortgaged property what would require the contraction of a debt with others, to secure which the law gives the creditor a lien over the goods, such a lien will have priority over the mortgage. For example, if the mortgagor is required to keep the mortgaged property in repair, or to feed and care for the mortgaged horses or cattle, he may in the performance of these duties contract for repairs or pasturage respectively, and the persons who make the one and furnish the other, will have a superior lien for his claim over the mortgaged property.<sup>5</sup>

<sup>1</sup> *Jenckes v. Goff*, 1 R. I. 511; *Abbott v. Goodwin*, 20 Me. 408; *Pratt v. Maynard*, 116 Mass. 388; *Thompson v. Blanchard*, 4 N. Y. 303.

<sup>2</sup> See *Brooks v. Record*, 47 Ill. 80; *Brandt v. Daniels*, 45 Ill. 453; *Thompson v. Blanchard*, 4 N. Y. 303; *White v. Phelps*, 12 N. H. 382.

<sup>3</sup> *Rider v. Powell*, 4 Abb. App. 63.

<sup>4</sup> *Taylor v. M'Keand*, 5 C. P. D. 858; *s. c.* 49 L. J. R. 568; *Barnard v. Eaton*, 2 Cush. 294; *Payne v. Fern*, 6 Q. B. D. 620.

<sup>5</sup> *Hammond v. Danielson*, 126 Mass. 207; *Bissell v. Pearce*, 28 N. Y.

But the mortgagor cannot give a prior lien where the law does not create one.<sup>1</sup>

§ 245. **Assignment of the mortgage.**—The legal assignment of the chattel mortgage can only be made by some lawful mode of transfer of a written instrument, *i.e.*, the mortgage itself must be assigned. If the mortgage-debt is also formally assigned, there can be no doubt that the assignee has acquired the entire interest of the mortgagee both in the debt and in the mortgage. And the assignee of the mortgage would also acquire the debt and beneficial interest in the mortgage without the formal assignment of the debt, if the intention to make this absolute transfer is manifested by some statement in the mortgage.<sup>2</sup> But if such an intention cannot be affirmatively established, the assignment of the mortgage without the debt is either a nullity or the assignee takes the mortgage in trust for the holder of the debt.<sup>3</sup>

On the other hand, although the assignee cannot acquire the legal title of the mortgage except by a formal transfer of the mortgage, since the mortgage is considered and treated in equity as an incident of the debt, and the debt as the principal thing, the assignment of the debt without a formal transfer of the mortgage will carry with it the

252. See, to the same effect, *Beall v. White*, 94 U. S. 382; *Scott v. Delahunt*, 5 Lans. 372; *Williams v. Allsup*, 10 C. B. (N. S.) 417; *The Scio*, L. R. 1 Adm. & Eccl. 353; *The St. Joseph*, 1 Brown Adm. 202; *Donnell v. The Starlight*, 108 Mass. 227; *The Granite State*, 1 Sprague, 277; *Provost v. Wilcox*, 17 Ohio, 359; *Case v. Allen*, 21 Kan. 217; *Buck v. Payne*, 52 Miss. 271.

<sup>1</sup> See *Smith v. Worman*, 19 Ohio St. 145; *Robinson v. Kruse*, 29 Ark. 575; *Jarchow v. Pickens*, 51 Iowa, 381; *Globe Works v. Wright*, 106 Mass. 207; *Lamphere v. Lowe*, 3 Neb. 131; *Sargent v. Usher*, 55 N. H. 287.

<sup>2</sup> *Jones v. Huggefard*, 3 Met. 515; *Sirrine v. Briggs*, 31 Mich. 443; *Barbour v. White*, 37 Ill. 164; *Campbell v. Birch*, 60 N. Y. 214; *Hill v. Beebe*, 13 N. Y. 556.

<sup>3</sup> *Polhemus v. Trainer*, 30 Cal. 685; *Earll v. Stumpf*, 56 Wis. (1882) 50; *Lucas v. Harris*, 20 Ill. 165.

equitable title of the mortgage, and such assignee could enforce the mortgage in his own behalf and name in a court of equity.<sup>1</sup> Such assignee can, in his own name, only resort to the equitable remedies of foreclosure, and will not be able to maintain the legal actions of trespass, trover and replevin, except in the name of the mortgagee.<sup>2</sup>

It has been held that the assignment of a part of the debt will operate as an assignment *pro tanto* of the mortgage.<sup>3</sup> But it would be only an equitable assignment, and if the mortgagee were to dispose of the whole debt and mortgage to one having no notice of the partial assignment, the purchaser would get an absolute title.<sup>4</sup> But if there is a formal assignment of the mortgage and debt *pro tanto*, the assignee becomes a tenant in common of the mortgaged property with the original mortgagee.<sup>5</sup>

If the debt is an open account or a non-negotiable instrument of indebtedness, the assignee can acquire no better title than what the assignor had, and defenses which could be set up against the enforcement of the mortgage by the mortgagee will prevail against his assignee also.<sup>6</sup> But, in some of the States, if the instrument of indebtedness be a

<sup>1</sup> Langdon v. Buel, 9 Wend. 89; Johnson v. Hart, 3 Johns. 323; Tison v. People's Sav. & Loan Ass., 57 Ala. 323; Woodruff v. King, 47 Wis. 261; Rice v. Cribb, 12 Wis. 179; Crain v. Paine, 4 Cush. 483; Martindale v. Burch, 57 Iowa, 291; Ramsdell v. Tewksbury, 73 Me. 197; Prout v. Root, 116 Mass. 413; Croft v. Bunster, 9 Wis. 503; Gaff v. Harding, 48 Ill. 150; Ellett v. Butt, 1 Woods, 214; Gould v. Marsh, 1 Hun, 566.

<sup>2</sup> Ramsdell v. Tewksbury, 73 Me. 197; Crain v. Paine, 4 Cush. 487.

<sup>3</sup> Emmons v. Dowe, 2 Wis. 322.

<sup>4</sup> French v. Haskins, 9 Gray, 195.

<sup>5</sup> Earll v. Stumpf, 56 Wis. (1882) 50.

<sup>6</sup> Trustees Union College v. Wheeler, 61 N. Y. 88; Ingraham v. Disborough, 47 N. Y. 421; Davis v. Bechstein, 69 N. Y. 440; Pendleton v. Fay, 2 Paige Ch. 202; Ellis v. Messervie, 11 Paige Ch. 467; 2 Denio, 640; Mott v. Clark, 9 Pa. St. 399; Twitchell v. McMurtrie, 77 Pa. St. 383; Losey v. Simpson, 10 N. J. Eq. 247; Musgrove v. Kennell, 23 N. J. Eq. 75; Reeves v. Scully, Walk. (Mich.) 248; Nicholls v. Lee, 10 Mich. 526; Croft v. Bunster, 9 Wis. 503; Goulding v. Bunster, 9 Wis. 503; Hortsman v. Gerker, 49 Pa. St. 282.



negotiable instrument, the mortgage being treated as an incident of the debt, it receives from the negotiable instrument its negotiable character, and passes to the assignee free from the equities existing between the mortgagor and mortgagee, unless by express terms the mortgage is assigned subject to the equities. But to be free from the existing equitable defenses, the assignment must be made before the debt is due.<sup>1</sup> But, in other States, it is held that the negotiable character of the instrument of indebtedness does not extend to the mortgage, which secures its payment. And although, so far as the personal liability of the mortgagor on the debt is concerned, the assignee takes the assignment free from the equities, the mortgage in his hands is subject to them.<sup>2</sup>

In every other respect where the assignment has been made in due form, the assignee of the mortgage may be said to acquire all the rights of his assignor, neither more nor less. If the mortgagee is entitled to possession, his assignee will also be entitled to possession; he may appropriate the profits and income while in possession, and in the same manner as the mortgagee maintain all the actions given for the protection of his interests.<sup>3</sup>

<sup>1</sup> *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, 10 Wall. 452; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 1 Hun. 566; 4 T. & C. 128; *Jackson v. Blodgett*, 5 Cow. 305; *Green v. Hart*, 1 Johns. 58C; *Taylor v. Page*, 6 Allen, 86; *Young v. Miller*, 6 Gray, 152; *Breen v. Seward*, 11 Gray, 118; *Dutton v. Ives*, 2 Mich. 515; *Bloomer v. Henderson*, 8 Mich. 395; *Cornell v. Hichens*, 11 Wis. 353; *Webb v. Haselton*, 4 Neb. 808.

<sup>2</sup> *Olds v. Cummings*, 31 Ill. 188; *Sumner v. Waugh*, 56 Ill. 531; *White v. Sutherland*, 64 Ill. 181; *Bally v. Smith*, 14 Ohio St. 396; *Boulogny v. Fortier*, 17 La. An. 121; *Johnson v. Carpenter*, 7 Minn. 176.

<sup>3</sup> *Phillips v. Bank of Lewiston*, 18 Pa. St. 394; *Green v. Marble*, 37 Iowa, 95; *Garrett v. Puckett*, 15 Ind. 485; *McGuffey v. Finley*, 20 Ohio, 474; *Walker v. Bank of Mobile*, 6 Ala. 452; *Andrews v. McDaniel*, 68 N. C. 385; *Miller v. Henderson*, 10 N. J. Eq. 320; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Bolles v. Carl*, 72 Minn. 113; *Barraque v. Manuel*, 7 Ark. 516; *Strang v. Allen*, 44 Ill. 428; *Phyfe v. Riley*, 15 Wend. 248;

§ 246. **Effect of tender and payment on mortgage.** — If the tender or payment of the mortgaged debt is made by a party having the right to redeem the property, whether he be the mortgagor or his assignee, before there has been a default, *i.e.*, when the debt falls due, the mortgage by its very terms becomes void, and the mortgagee's title to the goods terminates.<sup>1</sup>

But if there has been a default before tender or payment has been made, their effect will depend upon the view taken of the character of the mortgagee's interest in the property, and of the effect of default on his title. If the chattel mortgage is held to be strictly a conditional sale, and the whole title of the goods is held to pass to the mortgagee, subject only to the condition of forfeiture on payment of the debt, when it falls due, the failure to pay the debt when due operates to make the title of the mortgagee absolute, and at law the mortgagee could rightfully refuse a tender of the debt after default. Hence, where this view of the chattel mortgage prevails, an unaccepted tender of payment will not extinguish the mortgagee's title to the goods.<sup>2</sup> The mortgagor's title to the mortgaged property is not a legal one; it is simply an equity of redemption, and in equity alone can he enforce his right to recover the property by payment of the debt.<sup>3</sup> But if the tender of pay-

*Henshaw v. Wells*, 9 *Humph.* 568; *Northampton Mills v. Ames*, 8 *Met.* 1; *Erskine v. Townsend*, 2 *Mass.* 493; *Belding v. Manly*, 21 *Vt.* 551; *Eastman v. Batchelder*, 86 *N. H.* 141; *Jackson v. Hopkins*, 18 *Johns.* 487; *Jackson v. Bowen*, 7 *Cow.* 13; *Jackson v. Minkler*, 10 *Johns.* 480.

<sup>1</sup> *Shiver v. Johnston*, 62 *Ala.* 37; *Bellamy v. Doud*, 11 *Iowa*, 285; *Hunt v. Daniels*, 15 *Iowa*, 146; *Wallard v. Worthman*, 84 *Ill.* 446; *Slaughter v. Swift*, 67 *Ala.* 494; *Chapman v. Hunt*, 18 *N. J. Eq.* 414; *Harrison v. Hicks*, 1 *Port. (Ala.)* 423; *Bowditch v. Green*, 3 *Met.* 360; *Butler v. Tufts*, 13 *Me.* 302; *Dryer v. Lewis*, 57 *Ala.* 551.

<sup>2</sup> *Rogers v. Traders' Ins. Co.*, 6 *Paige*, 583, 587, 594; *Stoddard v. Dennison*, 38 *How. Pr.* 296; *Charter v. Stevens*, 3 *Denio*, 33; *Patchin v. Pierce*, 12 *Wend.* 61.

<sup>3</sup> *Hulser v. Walter*, 34 *How. Pr.* 335; *Boone v. Rains*, 7 *Mon.* 384; *Sims v. Canfield*, 2 *Ala.* 555; *Wheeler v. Miller*, 2 *Denio*, 172.

ment is accepted, the forfeiture for default is considered as having been waived, and the mortgagee's title to the mortgaged goods is undoubtedly extinguished, without any resort to a court for a decree of redemption;<sup>1</sup> and the mortgagor may at once bring his action at law for the recovery of the possession of the mortgaged property.<sup>2</sup>

But in some of the States, where the chattel mortgage is held to be nothing more than a lien, the general title to the mortgaged property remaining in the mortgagor, it is held that the tender will have the effect of extinguishing the mortgage, although made after the default in payment.<sup>3</sup> And even in those States, in which the common law theory, as to the character of a chattel mortgage, is still retained, it is sometimes held that the tender of payment will prevent the enforcement of the mortgage, if the mortgagee had not previously gained possession of the mortgaged goods, by enabling the mortgagor to defend the mortgagee's

<sup>1</sup> *West v. Crary*, 47 N. Y. 423; *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Parks v. Hall*, 2 Pick. 206; *Thompson v. Van Vechten*, 27 N. Y. 568; *Moak v. Bourne*, 13 Wis. 514; *Barry v. Bennett*, 7 Met. 354; *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Heyland v. Badger*, 35 Cal. 404; *Ackley v. Finch*, 7 Cow. 290; *Langdon v. Buel*, 9 Wend. 80; *Brown v. Bennett*, 8 Johns. 96; *Patchin v. Pierce*, 12 Wend. 61; *Blodgett v. Blodgett*, 48 Vt. 32. The same rule holds good, where the mortgage is given to secure the delivery of certain property at the agreed time, and a tender of delivery is made and accepted after default. *Butler v. Tufts*, 13 Me. 302. See *Moak v. Bourne*, *supra*. But the acceptance of a part of the mortgage debt will not have the effect of extinguishing the mortgage. *Patchin v. Pierce*, 12 Wend. 61; *Barry v. Bennett*, 7 Met. 354, 360; *Parks v. Hall*, 2 Pick. 206; *Charter v. Stevens*, 3 Denio, 33.

<sup>2</sup> *Leighton v. Shapley*, 8 N. H. 359; *Flanders v. Barstow*, 13 Me. 357; *West v. Crary*, 47 N. Y. 423; *Porter v. Parmley*, 52 N. Y. 185, 188; *Greene v. Dingley*, 24 Me. 131; *Sumner v. Batchelder*, 30 Me. 35, 39.

<sup>3</sup> *Flanders v. Chamberlain*, 24 Mich. 305; *Fuller v. Parrish*, 3 Mich. 211; *Husan v. Kanouse*, 13 Mich. 303; *Caruthers v. Humphrey*, 12 Mich. 270; *Moynahan v. Moore*, 9 Mich. 9; *Bartel v. Lope*, 6 Oreg. 321. See *Baxter v. Spencer*, 33 Mich. 325; *Kohl v. Lynn*, 34 Mich. 360; *Chapman v. State*, 5 Oreg. 432. And see, also, *Smith v. Phillips*, 46 Wis. 202; *Tompkins v. Batle*, 11 Neb. 147.

action for possession. This would, however, be an equitable defense, and could be set up in a legal action only in those States, in which all distinctions as to legal and equitable actions have been abolished.<sup>1</sup> And it has also been held, that if the mortgaged property should be lost or destroyed after a refusal of a proper tender of payment, the loss would fall upon the mortgagee.<sup>2</sup>

Whether the tender has to be kept good by a payment of the money into court, in order to extinguish the mortgage, is doubtful; some of the courts holding that this is necessary,<sup>3</sup> while others maintain the contrary.<sup>4</sup>

§ 247. **The mortgagor's right of redemption.** — As has been already explained,<sup>5</sup> according to the common law, the mortgagee's title to the mortgaged goods becomes absolute upon default in payment, and at law the mortgagor has, after default, no claim whatever on the mortgaged goods.<sup>6</sup> But, as in the case of mortgages of real property, so here, the court of equity assumed jurisdiction for the purpose of preventing an injustice to the mortgagor resulting from the forfeiture of his title to the mortgaged goods for default in payment, where the value of the goods was greater than the amount of the debt, and decreed that if the mortgagor would pay into court the full amount of the debt within a reasonable time after default, he shall have the right to recover his property from the mortgagee. And this is called

<sup>1</sup> *Musgat v. Pumpelly*, 46 Wis. 660. See *Archer v. Cole*, 22 How. Pr. 411.

<sup>2</sup> *Goodman v. Pledger*, 14 Ala. 114.

<sup>3</sup> *Smith v. Phillips*, 47 Wis. 202; *Patchin v. Pierce*, 12 Wend. 61; *Halstead v. Swartz*, 1 T. & C. 559; *Tompkins v. Batle*, 11 Neb. 147.

<sup>4</sup> *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Oreg. 321. See *Musgat v. Pumpelly*, 46 Wis. 660. See *Jones on Mortgages*, § 893, for the cases relating to mortgage of real property.

<sup>5</sup> See *ante*, §§ 221, 246.

<sup>6</sup> *Taber v. Hamlin*, 97 Mass. 489; *Burtis v. Bradford*, 122 Mass. 129; *Wendell v. N. H. Bank*, 9 N. H. 404, 420.

the mortgagor's right or equity of redemption.<sup>1</sup> This right of redemption is generally conceded to the mortgagor, independently of any statutory authority.<sup>2</sup>

The mortgagor is not permitted by any agreement, contemporaneous with the execution of the mortgage, to debar himself of his right of redemption. Such an agreement is absolutely void.<sup>3</sup>

But in order that the mortgagor may redeem his property from the mortgage, he must make a lawful tender of payment of the debt in full in the bill or before the suit is brought.<sup>4</sup> And the action must be brought within a rea-

<sup>1</sup> *Flanders v. Chamberlain*, 24 Mich. 305, 313; *Davis v. Hubbard*, 38 Ala. 185, 189; *Evans v. Merriken*, 8 Gill & J. 39; *Boyd v. Beandin*, 54 Wis. 193; *Leach v. Kimball*, 34 N. H. 568. In a late Indiana case, it was doubted whether the mortgagor had any equity of redemption in a chattel mortgage. *Sidener v. Bible*, 43 Ind. 230. But see *Blakemore v. Taber*, 22 Ind. 466; *Woodward v. Wilcox*, 27 Ind. 207; *Trittipo v. Edwards*, 35 Ind. 467; *Broadhead v. McKay*, 46 Ind. 595.

<sup>2</sup> *Flanders v. Barstow*, 18 Me. 357; *Charter v. Stevens*, 3 Denio, 33; *Stoddard v. Denison*, 38 How. Pr. 296; *Patchin v. Pierce*, 12 Wend. 61; *Dupuy v. Gibson*, 36 Ill. 197; *Wylder v. Crane*, 53 Ill. 490; *Foster v. Ames*, 1 Low. 313; *Smith v. Coolbaugh*, 21 Wis. 427; *Wilson v. Brannan*, 27 Cal. 258; *Bledgett v. Blodgett*, 48 Vt. 32; *Tannahill v. Tuttle*, 3 Mich. 104; *Flanders v. Chamberlain*, 24 Mich. 305; *Van Brunt v. Wakelee*, 11 Mich. 177; *Heyland v. Badger*, 35 Cal. 404; *Saxton v. Williams*, 15 Wis. 292; *Flanders v. Thomas*, 12 Wis. 410; *Walte v. Dennison*, 51 Ill. 319; *Hammers v. Dole*, 61 Ill. 307; *Bragelman v. Daue*, 69 N. Y. 69; *Hinman v. Judson*, 13 Barb. 629; *Pratt v. Stiles*, 17 How. Pr. 211; *s. c.* 9 Abb. Pr. 150; *West v. Crary*, 47 N. Y. 423. But the equitable remedy for redemption is always superseded by a statutory remedy, except where the latter remedy proves ineffectual. *Gordon v. Clapp*, 111 Mass. 22; *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248; *Bushnell v. Avery*, 121 Mass. 148.

<sup>3</sup> *Bunacleugh v. Poolman*, 3 Daly, 236; *Lavigne v. Naramore*, 52 Vt. 267. See *Landers v. George*, 49 Ind. 309.

<sup>4</sup> *Flanders v. Chamberlain*, 24 Mich. 305; *Lavigne v. Naramore*, 52 Vt. 267; *Stoddard v. Dennison*, 38 How. Pr. 296; *Halstead v. Swartz*, 46 How. Pr. 289, 291; *Hall v. Diltson*, 55 How. Pr. 19; *Adams v. Nebraska City Nat. Bank*, 4 Neb. 370; *Tallon v. Ellison*, 3 Neb. 63, 74. The failure to tender payment before the suit is brought only affects the question of costs. *Boyd v. Bendin*, 54 Wis. 193.

sonable time after default. What constitutes a reasonable time, independent of statutory regulation, will no doubt depend upon the circumstances of each case.<sup>1</sup> It would seem but proper that, as in the case of mortgages of real property, the provision of the statute of limitation in reference to actions at law for the recovery of personal property should govern by analogy this question of reasonable time in respect to the bill for redemption.<sup>2</sup> Where a statute provides a time for redemption, as a matter of course the action must be brought within that time.<sup>3</sup> In Maine, Massachusetts, Minnesota, Rhode Island, redemption can be claimed only within sixty days after forfeiture for default. In Kentucky, action for redemption must be brought within five years. In New Hampshire, Vermont, Delaware, Florida, Missouri, Pennsylvania, and South Carolina, statutes provide that the foreclosure of the mortgagor's equity of redemption shall not be made until due notice has been given, varying in length from 30 to 60 days.<sup>4</sup> But in any case, whether there be a statute or not, the time of redemption does not begin until there has been a default; and the mortgagor may by the terms of the mortgage have his entire life-time in which to pay the debt.<sup>5</sup>

If the mortgagee has consumed the property, or otherwise disposed of it, so that he could not, in obedience to a decree for redemption, restore the mortgaged property to the mortgagor, the court will, instead thereof, decree dam-

<sup>1</sup> *Lavigne v. Naramore*, 52 Vt. 267; *Arnold v. Chapman*, 13 R. I. 586; *Stoddard v. Dennison*, 38 How. Pr. 296; *Hatfield v. Montgomery*, 2 Port. (Ala.) 58.

<sup>2</sup> See *Byrd v. McDaniel*, 33 Ala. 18; *Perry v. Craig*, 3 Mo. 516; *Baker v. Baker*, 13 B. Mon. 406.

<sup>3</sup> *Winchester v. Ball*, 54 Me. 558; *Clapp v. Glidden*, 39 Me. 448.

<sup>4</sup> *Jones on Chattel Mortgages*, § 689.

<sup>5</sup> *Joyner v. Vincent*, 4 Dev. & Bat. 512; *Bartlett v. Thynes*, 2 Hill (C. C.) Eq. 171. And part payment will stop the running of the time of redemption. *Winchester v. Ball*, 54 Me. 558.

ages to be estimated by the value of the mortgaged property at the time that it was disposed of by the mortgagee.<sup>1</sup>

§ 248. **The mortgagee's right of possession after forfeiture.** — Upon default in the payment of the mortgage debt, the legal title of the mortgagee, according to the generally prevailing theory of chattel mortgages, becomes absolute in him, and the legal title of the mortgagor is defeated altogether. In consequence of his acquisition of the absolute title to the mortgaged goods, the mortgagee is entitled to the possession of the goods, and may maintain his action of replevin for the recovery of the possession of them. And he has this right to possession after forfeitures, notwithstanding the provisions in the mortgage for the sale of the property, and a payment to the mortgagor of the surplus remaining after a satisfaction of the mortgage debt.<sup>2</sup>

<sup>1</sup> *Mowry v. First Nat. Bank*, 54 Wis. 38; *Boyd v. Beandin*, 54 Wis. 193; *Blodgett v. Blodgett*, 48 Vt. 32; *Stoddard v. Dennison*, 38 How. Pr. 296; *Bragelman v. Dane*, 69 N. Y. 69.

<sup>2</sup> *Burdick v. McVanner*, 2 Denio, 170; *Durfree v. Grinnell*, 69 Ill. 371; *Nichols v. Webster*, 1 Chandl. 203; *McConnell v. Scott*, 67 Ill. 274; *Jefferson v. Barkto*. 1 Bradw. 563. See, also, generally, as to effect of default on the mortgagee's title to the mortgaged goods, *Lowe v. Wing*, 56 Wis. (1882) 31; *Smith v. Koust*, 50 Wis. 360; *Smith v. Coolbaugh*, 21 Wis. 427; *Musgate v. Pampelly*, 46 Wis. 660; *Blodgett v. Blodgett*, 48 Vt. 32; *Hulsen v. Walter*, 34 How. Pr. 385; *Fuller v. Acker*, 1 Hill, 473; *Ackley v. Finch*, 7 Cow. 290; *Hall v. Snowhill*, 2 Green (N. J. L.) 8; *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313; *Robinson v. Campbell*, 8 Mo. 365; *s. c. Id.* 615; *Volney Stamps v. Gilman*, 43 Miss. 456; *Flanders v. Barstow*, 18 Me. 357; *Brown v. Phillips*, 3 Bush, 656; *Fikes v. Manchester*, 43 Ill. 379; *Simmons v. Jenkins*, 76 Ill. 479; *Constant v. Matterson*, 23 Ill. 546; *Rhines v. Phelps*, 3 Gilm. 455; *Wright v. Ross*, 36 Cal. 414; *Heyland v. Badger*, 35 Cal. 404; *Brown v. Lipscomb*, 9 Port. 472; *Nervine v. White*, 50 Ala. 388; *Moore v. Murdock*, 26 Cal. 514; *In re Haake*, 2 Sawy. 231; *Larmon v. Carpenter*, 70 Ill. 549; *McConnell v. People*, 84 Ill. 533; *Pike v. Calvin*, 67 Ill. 227; *Bean v. Barney*, 10 Iowa, 498; *Winchester v. Ball*, 54 Me. 553; *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; *s. c.* 2 Fed. Rep. 123; *Thornhill v. Gilmer*, 4 Sm. & M. 153; *Bowens v. Benson*, 57 Mo. 26; *Leach v. Kimball*, 34 N. H. 563; *Woodside v. Adams*, 40 N. J. L. 417; *Langdon v. Buel*, 9 Wend. 80; *Patchin v. Pierce*,

And, although the mortgagor still has his equity of redemption, by the enforcement of which he can recover his property, the mortgagee is not obliged to proceed to the foreclosure of the equity of redemption, because he had taken possession of the property. He has a right to hold the possession, as long as the debt remains unpaid, and can force the mortgagor to the action for redemption.<sup>1</sup>

The mortgagee, by taking possession of the mortgaged goods on default of payment, acquires the right, independent of any decree of court or special grant of power of sale, to bar the mortgagor's equity of redemption by a sale of the mortgaged property. The relation of the mortgagor and mortgagee, under these circumstances, is held to be equivalent to that of pledgor and pledgee, and the mortgagee acquires the pledgee's right to sell after due notice to the mortgagor. This is not only the case, where there is no grant of power to sell,<sup>2</sup> but also, where express provisions for the sale of the property at public auction are contained

12 Wend. 61; s. c. 1 Hill, 478; *Moody v. Haseldon*, 1 S. C. 129; *Flanders v. Thomas*, 12 Wis. 410; *Smith v. Phillips*, 47 Wis. 202. A different rule obtains in Michigan and Oregon, where it is held that the mortgagor is not divested of his legal title to the mortgaged property, until the transfer under a decree of foreclosure. *Kohl v. Lynch*, 34 Mich. 360; *Baxter v. Spencer*, 33 Mich. 325; *Cary v. Hewitt*, 26 Mich. 228; *Lucking v. Wesson*, 25 Mich. 448; *Chapman v. State*, 5 Oreg. 432.

<sup>1</sup> *Craig v. Tappin*, 2 Sandf. Ch. 78; *Bradley v. Redmond*, 42 Iowa, 452; *Nichols v. Webster*, 1 Chand. (Wis.) 203; *Craft v. Bullard*, 1 Smed. & M. Ch. 866; *Murry v. Erskine*, 109 Mass. 597.

<sup>2</sup> *Patchin v. Pierce*, 12 Wend. 61, 63; *Charter v. Stevens*, 3 Denio, 33; *Craig v. Tappin*, 2 Sandf. Ch. 78, 90; *Chamberlain v. Martin*, 43 Barb. 607; *Huggans v. Fryer*, 1 Lans. 276; *Talman v. Smith*, 39 Barb. 390; *Hall v. Bellows*, 11 N. J. Eq. 333; *Rumson v. Groshon*, 12 N. J. Eq. 86; *Denny v. Faulkner*, 22 Kan. 89; *Bryan v. Robert*, 1 Strobb. Eq. 334; *Broadhead v. McKay*, 46 Ind. 595; *Wilson v. Brannan*, 27 Cal. 258; *Bryant v. Carson River Lumbering Co.*, 3 Nev. 813; *Johnson v. Vernon*, 1 Bailey, 527; *Bird v. Davis*, 14 N. J. Eq. 467; *Champman v. Hunt*, 13 N. J. Eq. 870; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93; *Hulsen v. Walter*, 34 How. Pr. 335; *Ballou v. Cunningham*, 60 Barb. 425; *Hall v. Ditson*, 55 How. Pr. 19; *Stoddard v. Dennison*, 38 How. Pr. 296; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100.



in the mortgage, the property may be sold at private sale, under this implied power, if the mortgagee has taken possession of the property.<sup>1</sup> And in New York it has been held that the sale operates as a valid bar of the mortgagor's equity, although no notice of the projected sale has been given to him.<sup>2</sup> But a reasonable notice of the sale is generally required to be given to the mortgagor; and what is a reasonable notice is generally to be determined by a consideration of all the circumstances of each particular case.<sup>3</sup>

§ 249. **Foreclosure of the mortgagor's equity of redemption in equity and at law.** — Where the mortgagee has not acquired the possession of the mortgaged property after default and the mortgage cannot for that reason be considered to have the characteristics of a pledge, the mortgagor's equity cannot be barred by the mortgagee's sale of the property, unless the mortgagor has consented to the sale, when it becomes in effect the joint sale of the two, and an equivalent of foreclosure;<sup>4</sup> or the sale is made under a judicial decree, or in the exercise of a special power of sale.

In very many of the States, the statutes provide for the foreclosure of chattel mortgages, and wherever these provisions are to be found, they must be complied with, in order to secure a foreclosure of the chattel mortgage.<sup>5</sup> But

<sup>1</sup> *Flanders v. Chamberlain*, 24 Mich. 305; *Talman v. Smith*, 39 Barb. 390; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Robinson v. Campbell*, 8 Mo. 365; *s. c. Id.* 615; *Dane v. Mallory*, 16 Barb. 46; *Landon v. Emmons*, 97 Mass. 37; *McConnell v. People*, 84 Ill. 583; *Waite v. Dennison*, 51 Ill. 319; *Hungate v. Reynolds*, 72 Ill. 425; *Wylder v. Crane*, 53 Ill. 490.

<sup>2</sup> *Chamberlain v. Martin*, 43 Barb. 607; *Hall v. Ditson*, 55 How. Pr. 19; *s. c.* 5 Abb. N. C. 198; *Patchin v. Pierce*, 12 Wend. 61.

<sup>3</sup> *Wilson v. Brannan*, 27 Cal. 358; *Bird v. Davis*, 14 N. J. Eq. 467. See *Freeman v. Freeman*, 17 N. J. Eq. 44, 47.

<sup>4</sup> *Harris v. Lynn*, 25 Kan. 281; *Talman v. Smith*, 39 Barb. 390; *McConnell v. People*, 71 Ill. 481.

<sup>5</sup> See *Jones on Chattel Mortgages*, Chapter XVII.

in the absence of exclusive statutory provisions, the court of equity has ample power to decree a foreclosure of the mortgagor's equity on reasonable terms.<sup>1</sup> And the right to a foreclosure by a bill in equity is not taken away or precluded by the existence of a power of sale in the mortgagee for the purpose of a substitute for foreclosure. The mortgage may be foreclosed in equity although the mortgage contains such a power of sale.<sup>2</sup> Nor is the right to foreclosure precluded by the mortgagee's right at law to recover the possession, and by such possession to be enabled to sell the property.<sup>3</sup>

The foreclosure of chattel mortgages in equity differs in no essential respect from that of real estate mortgages, and inasmuch as in the case of the former, foreclosure is rarely resorted to, because chattel mortgages almost always contain a grant of a power to sell, it is not considered necessary to refer in detail to the essentials of an action for the foreclosure. For further information the reader may be referred to works which treat of the foreclosure of real estate mortgages.<sup>4</sup>

§ 250. Foreclosure under power of sale. — Chattel mortgages, however, almost invariably contain an express grant of the power to secure the satisfaction of the debt by an absolute sale of the mortgaged chattels. This power, when given in a chattel mortgage corresponds in every es-

<sup>1</sup> *Brown v. Greer*, 13 Ga. 285; *Broadhead v. McKay*, 46 Ind. 595; *Morris v. Tillson*, 81 Ill. 607; *Hammers v. Dole*, 61 Ill. 307; *Dupuy v. Gibson*, 36 Ill. 197; *Hall v. Bellows*, 11 N. J. Eq. 833; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Charter v. Stevens*, 3 Den. 33; *Wylder v. Crane*, 53 Ill. 490; *Aldrich v. Goodell*, 75 Ill. 452; *Packard v. Kingman*, 11 Iowa, 219; *Blakemore v. Taber*, 22 Ind. 466.

<sup>2</sup> *Briggs v. Oliver*, 68 N. Y. 336; *Rich v. Milk*, 20 Barb. 616.

<sup>3</sup> *Marx v. Davis*, 56 Miss. 745; *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93.

<sup>4</sup> 2 Jones on Mortgages, §§ 1363, 1442; Tiedeman on Real Prop., §§ 358, 362.

essential particular to the implied power which the pledgee has as an incident of his pledge. In most of the States, the exercise of the power is subjected to statutory regulation, and it is needless to state that the requirements of the statute must be strictly observed, in order that the sale might be valid. The usual requirements are that the sale shall be public, after due notice by publication of the time and place; and in every way conducted in good faith towards the mortgagor.

But in the absence of statutory requirements, the sale may be conducted in any way, consistent with perfect good faith and fairness towards the mortgagor. This is the only general requirement in the absence of statute.<sup>1</sup> Unless otherwise required, subject always to the general requirement of good faith and fairness towards the mortgagor, the mortgagee may sell at private sale, instead of at public auction, certainly where he takes possession of the property,<sup>2</sup> or he is authorized to sell at either kind of sale.<sup>3</sup> Nor is the customary notice to the mortgagor absolutely necessary, if made at private sale.<sup>4</sup> The sale may be made of the mortgaged goods in different parcels, or in one lump, according to which promises to yield the largest returns, the law ordinarily presuming, in the absence of proof to the contrary, that it is to the advantage of the mortgagor to sell in lots or parcels, suited to the convenience of the bidders.<sup>5</sup> And where the sale is made by parcels,

<sup>1</sup> *Stoddard v. Dennison*, 38 How. Pr. 296; *Hall v. Ditson*, 55 How. Pr. 19; 5 Abb. N. C. 198; *Robinson v. Bliss*, 121 Mass. 428; *Gordon v. Clapp*, 113 Mass. 335; *Hale v. Omaha Nat. Bank*, 64 N. Y. 550; *Hungate v. Reynolds*, 72 Ill. 425.

<sup>2</sup> *Walte v. Dennison*, 51 Ill. 319; *Wylder v. Crane*, 53 Ill. 490; *Hungate v. Reynolds*, 72 Ill. 425; *McConnell v. People*, 84 Ill. 533.

<sup>3</sup> *Chamberlain v. Martin*, 43 Barb. 607; *Harris v. Lynn*, 25 Kan. 281.

<sup>4</sup> *Wylder v. Crane*, 53 Ill. 490, 493; *Ballou v. Cunningham*, 60 Barb. 425; *Chamberlain v. Martin*, 43 Barb. 607; *Huggans v. Fryer*, 1 Lans. 276.

<sup>5</sup> *Hannah v. Carrington*, 18 Ark. 85; *Hungate v. Reynolds*, 72 Ill. 425; *Stromberg v. Lindberg*, 25 Minn. 513.

it should be brought to an end, as soon as the proceeds are sufficient to satisfy the mortgagee's claim. The continuance of the sale after that point is reached would amount to an unlawful conversion.<sup>1</sup> The mortgagee may sell upon credit,<sup>2</sup> but he cannot barter or exchange the mortgaged property for other property.<sup>3</sup> If it should seem on a reasonable review of the case to the interest of all parties concerned to postpone or adjourn the sale, the mortgagee has the right to do so.<sup>4</sup>

But, unless specially authorized to do so in the mortgage, the mortgagee cannot be a purchaser of the mortgaged property at his own sale, on the general ground that he could not act as a vendor and vendee in the same transaction, without endangering the interests of the mortgagor, since their interest would in such a case be antagonistic. A mortgagee's purchase at his own sale, whether direct or indirect, is, however, not absolutely void, but voidable at the instance of the mortgagor.<sup>5</sup>

<sup>1</sup> *Charter v. Stevens*, 3 Denio, 33.

<sup>2</sup> *Williams v. Hatch*, 38 Ala. 338.

<sup>3</sup> *Edwards v. Cottrell*, 43 Iowa, 194. See *Williamson v. Berry*, 8 How. 495; *Bigley v. Risher*, 63 Pa. St. 152.

<sup>4</sup> *Hosmer v. Sargent*, 8 Allen, 97, citing *Richards v. Holmes*, 18 How. 143.

<sup>5</sup> *Korns v. Shaffer*, 27 Md. 88; *Hungate v. Reynolds*, 72 Ill. 425; *Webber v. Emmerson*, 3 Col. 248; *Pettibone v. Perkins*, 6 Wis. 616; *Alger v. Farley*, 19 Iowa, 518; *Goodell v. Dewey*, 100 Ill. 308; *Emmons v. Hawn*, 75 Ind. 356; *Massey v. Hardin*, 81 Ill. 330; *Beard v. Westerman*, 32 Ohio St. 29; *Imboden v. Hunter*, 23 Ark. 622; *People v. Wiltshire*, 9 Bradw. 374; *Gear v. Schrei*, 57 Iowa, 666; *Cunningham v. Rogers*, 14 Ala. 147; *Boyd v. Beaudin*, 54 Wis. 193; *Phrase v. Barbour*, 49 Ill. 370; *Waite v. Dennison*, 51 Ill. 319. The same rule is held to apply to the purchase of the mortgaged goods by the creditor, where the chattel mortgage and power of sale have been given to one in trust for him, and the sale is conducted by the trustee. *Hannah v. Carrington*, 18 Ark. 85. But see, *contra*, *Lyon v. Jones*, 6 Humph. 533, which enunciates the better rule. In New York and South Carolina the mortgagee is held to be authorized to purchase at his own sale. *Hall v. Ditson*, 55 How. Pr. 19; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; *Black v. Hair*, 2 Hill (S. C.) Eq. 622; *Mills v. Williams*, 16 S. C. 593.

## CHAPTER XVII.

### INVOLUNTARY SALES, INCLUDING SALES BY LEGAL PROCESS.

- SECTION 252.** General propositions as to involuntary alienation.  
253. Sale by guardian of ward's personal property.  
254. Husband's power to sell his wife's personal property.  
255. Attachment and execution.  
256. Judicial sales, what are.  
257. The general requirements of judicial and execution sales.  
258. Who may make the sale.  
259. When sale must be public.  
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261. Place of sale.  
262. Sale in parcels.  
263. Terms of sale.  
264. Sale after return day.  
265. Adjournment of the sale.

§ 252. **General propositions as to involuntary alienation.** — It is true with personal, as with real property, that as a general rule the property of one man cannot by legislative enactment be taken away and given to another. Not only is this true in respect to known and recognized owners of personal property, but it is also true where the property is not claimed by any visible or known owner. Thus it was held in North Carolina to be unconstitutional for the State by statute to appropriate the unclaimed dividends of private corporations to public uses.<sup>1</sup> For the same reasons the legislative diversion of a bequest to a different use, than what was provided by the donor, was held to be unconstitutional, although in both cases the State was the beneficiary.

<sup>1</sup> *University of North Carolina v. N. C. R. R. Co.*, 76 N. C. 103 (22 Am. Rep. 671).

The diversion was an interference with the reversionary interest of the donor's next of kin.<sup>1</sup>

But, notwithstanding this general rule, there are a few exceptional cases in which the State may lawfully dispose of one's personal property against his will. They are principally cases, in which the State authorities interfere with one's property and proceed to sell it for the purpose of satisfying the claims of creditors, private or public, or in order to prevent loss to the owner, where the owner cannot on account of some mental or other disability make the sale himself. These will be discussed *seriatim* in the succeeding paragraphs. In some of the State constitutions there is a provision against the enactment of special laws operating upon particular individuals or upon their property. In those States, therefore, involuntary alienation can only be effected by a general law, applicable to all persons under like circumstances. But in the absence of such a constitutional provision, the transfer of property may be made by special act of the legislature, as well as under a general law,<sup>2</sup> unless the transfer by special act would involve the assumption by the legislature of judicial power, when it will be held to be void, under the general constitutional provision which denies to the legislature the exercise of judicial power.<sup>3</sup>

It seems to be very doubtful whether there is any room for the application of the principles of eminent domain to personal property, although Mr. Cooley claims that the State may, in the exercise of its right of eminent domain, appropriate to a public use private property of every description.<sup>4</sup> This is confounding the meaning of terms, if

<sup>1</sup> Trustees Book Academy v. George, 14 W. Va. 411 (35 Am. Rep. 760).

<sup>2</sup> Sohler v. Mass. Gen. Hospital, 3 Cush. 488; Kibby v. Chitwood, 4 B. Mon. 95; Edwards v. Pope, 4 Ill. 473.

<sup>3</sup> Rice v. Parkman, 16 Mass. 326; Jones v. Perry, 10 Yerg. 59; Lane v. Dorman, 4 Ill. 238; Edwards v. Pope, 4 Ill. 473.

<sup>4</sup> Cooley Const. Lim. 649, 652, 653.

by the term "eminent domain" is meant, as its history would seem to indicate, that superior and absolute right of property which the State, as the legal representative of organized society, has in the lands within its borders, and subordinate to which all private property therein is held.<sup>1</sup> But whether this be true or not, it is quite probable that, in cases of extreme necessity, the State may appropriate the personal property of the citizen on payment of its full value. At least this is the case in time of war. The governments of all civilized nations exercise this power of appropriation of personal property, in order to supply themselves with whatever is needful in the prosecution of the war; and the forcible and irregular seizure of property by military commanders have been justified, when the necessity was urgent and such as would admit of no delay, and where the civil authorities would be too late in providing the means required for the occasion.<sup>2</sup> Not only does the State, in time of war, appropriate whatever personal property they may need for the prosecution of the war, as food or ammunition or weapons of warfare, but it more frequently makes forced loans of capital from its people by compelling them to accept its treasury notes as legal tender in payment of debts both public and private, and that, too, in time of peace, as well as during a war.<sup>3</sup>

It is quite likely that the State may, in any other case of extreme necessity, appropriate whatever of private property may be needful to satisfy some urgent general want. Suppose, for example, in the case of a general failure of the crops, a famine should occur, and those who did possess stocks of provisions refused to sell at any reasonable price, or refused to sell at all, while the people were being

<sup>1</sup> See Tiedeman's Limitations of Police Power, § 121.

<sup>2</sup> *Farmer v. Lewis*, 1 Bush, 66. See *Harmony v. Mitchell*, 1 Blatchf. 549; *Mitchell v. Harmony*, 13 How. 115.

<sup>3</sup> See Tiedeman's Limitations of Police Power, § 90.

carried along to the extremity of starvation. Could not the State compel those, who had a "corner" on the provision market, to deliver up their property for the public good, on payment of a reasonable price? Every one has, under the ordinary constitutional limitations, a right to put on his goods whatever price his judgment, his cupidity, or other feeling might prompt, subject ordinarily to no regulation by the State.<sup>1</sup> But when the public want of food and clothing becomes so great that the hoarding of the existing supply will be sure to give rise to serious disturbances of the public peace and the violent appropriation of the things which are denied them, — not to consider the moral offense of withholding food from starving people — it is idle to speak of the sacredness of private property. It cannot be doubted that an official appropriation of articles of food, under circumstances of such urgent necessity, would be judicially justified on the plea of necessity, however illogical it may seem.

§ 253. **Sale by guardian of ward's personal property.**— Persons who suffer from mental disability either through tenderness of age, as in the case of infants, or through dementia, as in the case of the insane person, the habitual drunkard,<sup>2</sup> or the spendthrift,<sup>3</sup> are placed under the personal control of a guardian, while their property is likewise cared for by a guardian or curator. As to the personal control of these persons, nothing need be said in this place. The guardian or curator, of course, takes possession of the property of his ward in a fiduciary character, and is

<sup>1</sup> See Tiedeman's Limitations of Police Power, § 95.

<sup>2</sup> The derangement of mind resulting from habitual drinking of intoxicating liquors, would place the drunkard in the same category with the ordinary lunatic. *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Imhoff v. Whitmer*, 21 Pa. St. 243; *Devin v. Scott*, 34 Ind. 67.

<sup>3</sup> *Schouler Dom. Rel.* 404. As to the power to subject spendthrifts to the control of a guardians, see Tiedeman's Limitations of Police Power, § 138.



required to deal honestly and justly, being generally placed under the supervision of the probate or orphan's court and required to make periodical settlements with the approval of the court. But, in the absence of statutes to the contrary, the guardian has the ordinary power of selling the personal property of the ward, without any order of court, and whenever he should deem it advisable to do so.<sup>1</sup> But, a guardian cannot mortgage his ward's property, except in pursuance of an order of court.<sup>2</sup>

§ 254. **Husband's power to sell his wife's personal property.**— This subject has been already sufficiently discussed in another place,<sup>3</sup> and it is unnecessary to say any thing further here.

§ 255. **Attachment and Execution.**— Attachment and execution are both legal processes, whereby the creditor is enabled to recover of his debtor sufficient property, by a sale of which to satisfy his claim. Both are statutory writs, and depend for their scope, and the limitation under which they can be issued, upon the provisions of the statutes of the several States. By these writs, the officer to whom they are directed, usually the sheriff, is required to seize sufficient property of the debtor to satisfy the creditor's claim, and to sell the same, applying the proceeds of sale to the liquidation of the debt. The attach-

<sup>1</sup> Schouler Dom. Rel. 461-479; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Wallace v. Holmes*, 9 Blatchf. 67; *Humphrey v. Buisson*, 19 Minn. 182; *Woodward v. Donally*, 27 Ala. 198. But see, *contra*, *McDuffie v. McIntyre*, 11 S. C. 551. In California, a statute requires an order of court in every case. *Kendall v. Miller*, 9 Cal. 591; *De L. Montague v. Union Ins. Co.*, 42 Cal. 290.

<sup>2</sup> *Sample v. Lane*, 45 Miss. 556; *Merritt v. Simpson*, 41 Ill. 391; *Wood v. Truax*, 39 Mich. 628; *Battell v. Torrey*, 65 N. Y. 294; *United States Mortgage Co. v. Sperry*, 24 Fed. Rep. 838; *Edwards v. Talliafero*, 84 Mich. 13; *Lovelace v. Smith*, 39 Ga. 180.

<sup>3</sup> See *ante*, §§ 27-30.

ment is issued at the beginning of the suit between the creditor and his debtor, whenever, in consequence of the absconding of the debtor, or of his attempt to commit fraud, the creditor is in danger of losing his claim. The attachment is conditional upon the recovery of a judgment, and upon the procurement of a judgment for the debt, the property is sold by the sheriff, in the same manner as he is required to do in the case of a levy of execution. The levy of execution is made on a judgment debtor's property in satisfaction of the judgment which has been previously obtained against him. In both cases, the effect of the levy is to take the right of possession out of the debtor and to vest it in the sheriff, who is thereby authorized to maintain the possessory actions against any one who interferes with the possession of the sheriff, during the continuance of the execution,<sup>1</sup> and prevents any seizure of the same goods under other writs.<sup>2</sup> The title which the sheriff acquires by his seizure under these writs is fiduciary in character, and is given him for the purpose of enabling him to sell the property at public sale to the highest bidder, and with the proceeds of sale to pay the judgment which constitutes the basis of the levy. If the debt is paid before a sale, the execution is satisfied, and the title reverts to the original owner.<sup>3</sup>

The requirements of the law in respect to the mode of

<sup>1</sup> *Dunkin v. McKee*, 23 Ind. 447; *Weatherby v. Covington*, 8 Strobb. 27; *Williams v. Herndon*, 12 B. Mon. 484; *Brewster v. Vall*, 1 Spencer (N. J.), 56; *Dezell v. Odell*, 8 Hill, 215; *Fuller v. Loring*, 42 Me. 488; *Parker v. David*, 45 Miss. 488; *Sherman v. Howell*, 40 Ga. 257; *Martin v. Watson*, 8 Wis. 815; *Howland v. Wells*, 9 N. Y. 178.

<sup>2</sup> *Hagan v. Lucas*, 10 Pet. 400; *Freeman v. Howe*, 24 How. 450; *Winegardner v. Hafer*, 15 Pa. St. 144; *Payne v. Dreme*, 4 East, 523; *Smith v. McIven*, 9 Wheat. 532; *Wood v. Lake*, 13 Wis. 84; *Hackley v. Swigert*, 5 B. Mon. 86; *Hardy v. Tilton*, 68 Me. 195; *Lewis v. Buck*, 7 Minn. 104; *Riggs v. Johnson*, 6 Wall. 197; *Buckey v. Snouffer*, 10 Md. 149; *Sterling v. Welcome*, 20 Wend. 228; *Covell v. Hyman*, 111 U. S. 176; *Pipher v. Fordyce*, 88 Ind. 436.

<sup>3</sup> See *Beard v. Millikan*, 68 Ind. 231; *Morris v. Lake*, 9 Sm. & M. 531.

conducting sheriff's sales are so much like those which apply to judicial sales, that it will not be necessary to discuss them separately. They will be presented in succeeding pages.

§ 256. **Judicial sales, what are.** — A judicial sale is one which is made, in pursuance of an order or decree from a court of competent jurisdiction, by the officer who is appointed to conduct the sale. The court is properly considered the vendor, the officer who makes the sale being merely the instrument or agency of the court.<sup>1</sup> Since a judicial sale is defined to rest for its validity upon some special decree of the court, the sale on execution is not strictly a judicial sale,<sup>2</sup> unless such a sale is required, as is the case in several of the States, to be confirmed by the court, when it is strictly proper to class it with judicial sales.<sup>3</sup> In these respects, judicial sales are said to be distinguishable from sales on execution; *first*, as already stated, in that the former proceeds from a judicial decree; <sup>4</sup> *secondly*, that the action, in which the decree is given, is

<sup>1</sup> *Bozza v. Rowe*, 80 Ill. 198; *Armor v. Cochrane*, 66 Pa. St. 308, 311; *Harrison v. Harrison*, 1 Md. Ch. 333; *Hurt v. Stull*, 4 Md. Ch. 393; *Williamson v. Berry*, 8 How. 547; *Chew v. Hyman*, 7 Fed. Rep. 7; *Hutton v. Williams*, 35 Ala. 503; *Sacket v. Twining*, 18 Pa. St. 202; *Vanderver v. Baker*, 13 Pa. St. 126; *Halleck v. Guy*, 9 Cal. 181; *Ketchum v. Schiekentanz*, 73 Ind. 137; *McCracken v. Kuhn*, 73 Ind. 149; *Diesback v. Stein*, 41 Ohio St. 70; *Sturdevant v. Norris*, 30 Iowa, 65.

<sup>2</sup> *Griffith v. Fowler*, 18 Vt. 394; *Hersby v. Latham*, 42 Ark. 305; *Gowan v. Jones*, 10 Smed. & M. 164; *Andrews v. Scotton*, 2 Bland (Md.), 629; *Forman v. Hunt*, 3 Dana, 614, 621; *McKee v. Lineberger*, 69 N. C. 219.

<sup>3</sup> *Griffith v. Bogert*, 18 How. 159, 164; *Eakin v. Herbert*, 4 Coldw. 116; *Curtis v. Norton*, 1 Ohio, 278; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Thompson v. Phillips*, Baldw. 246, 272; *Bally v. Bally*, 9 Rich. Eq. 392, 395; *Smith v. Arnold*, 5 Mass. 414, 420. Under the Indiana statute execution sales are held to be judicial sales. *Taylor v. Stockwell*, 66 Ind. 505; *Jackman v. Nowling*, 69 Ind. 188; *Lawson v. DeBolt*, 78 Ind. 563.

<sup>4</sup> *Andrews v. Scotton*, 2 Bland (Md.), 629; *Forman v. Hunt*, 3 Dana (Ky.), 614, 621; *McKee v. Lineberger*, 69 N. C. 219.

wholly or partly *in rem*;<sup>1</sup> and, *thirdly*, that judicial sales are not within the statute of frauds, while execution sales are.<sup>2</sup>

But, notwithstanding this difference in the origin of judicial and execution sales, they are both so much alike in their effect, both being involuntary sales, by which the owner is divested of his property against or without his assent, that the same general requirements as to the manner of conducting the sale are applicable to both classes of sales, and hence what is stated in the succeeding paragraphs, applies to execution, as well as to judicial, sales unless it is otherwise stated.

§ 257. **The general requirements of judicial and execution sales.**—It is very common for the statutes of a State to contain regulations concerning the conduct of all sorts of public sales, and more especially in the case of sales on execution. And where there are statutory requirements, they must be strictly obeyed, in order that the sale may be valid. But, even in the absence of statutory regulations, some formalities are required, to which reference will be made. It will be impossible, in an elementary treatise like the present book, to give the statutory requirements in detail, and the present text is confined to a statement of the general requirements of public sales.

§ 258. **Who may make the sale.**—If it be a judicial sale, the officer who is named in the order or decree must conduct the sale, and no one else,<sup>3</sup> except the officer

<sup>1</sup> *Grignon v. Astor*, 2 How. 819; *Beauregard v. New Orleans*, 18 How. 497, 502. The sale under writ of attachment is based upon an action *in rem*.

<sup>2</sup> *Watson's Admr. v. Violet*, 2 Duv. 332; *Atty.-Gen. v. Day*, 1 Ves. Sr. 218; *Blagden v. Bradbear*, 12 Ves. 466.

<sup>3</sup> *Chambers v. Jones*, 72 Ill. 275. If two or more commissioners are appointed by the court to conduct the sale, all must join in the sale to make it valid, unless there is a statute providing the contrary. *Gross v. Percy*, 2 Pat. & H. (Va.) 483.

or officers may appoint an auctioneer to conduct the sale as their agent, in their presence and under their direction. It would not be permissible, however, for the officer to turn the sale over to the discretion of the auctioneer.<sup>1</sup> If the sale is on execution, the writ is directed to the sheriff, generally, and he or his deputy executes it and conducts the sale,<sup>2</sup> except that the sheriff cannot execute the writ, when he is himself the judgment creditor.<sup>3</sup> But if the sheriff's term of office expires after the levy, but before the sale, he is not only authorized to make the sale,<sup>4</sup> but he may be compelled to do so.<sup>5</sup> If the sheriff dies after the levy it seems that his personal representatives may make the sale.<sup>6</sup>

§ 259. When sale must be public. — As a general rule, the judicial as well as the execution sales are required to be by public auction; and when that is the case, a private sale is invalid.<sup>2</sup> But in the case of judicial sales, a private sale

<sup>1</sup> *Williamson v. Berry*, 8 How. 495; *Blossom v. Railroad Co.*, 3 Wall. 196, 205; *Heyer v. Deaves*, 2 Johns. Ch. 154.

<sup>2</sup> *Levett v. Farrar*, Cro. Eliz. 294; *Wroe v. Harris*, 2 Wash. (Va.) 126; *Tillotson v. Cheetham*, 2 Johns. 63; *Glasgow's Lessee v. Smith*, 1 Overt. 144.

<sup>3</sup> *River v. Stacy*, 8 Humph. 288; *Collais v. McLead*, 8 Ired. L. 221; *Chambers v. Thomas*, 3 A. K. Marsh. 536. In such a case, according to the common law, the coroner was the proper party to execute the writ and conduct the sale. 1 Blackst. 349.

<sup>4</sup> *Purl v. Duval*, 5 Har. & J. 69; *Evans v. Ashley*, 8 Mo. 183; *Edwards v. Tipton*, 77 N. C. 222; *Lofland v. Ewing*, 5 Litt. 42; *Clark v. Sawyer*, 48 Cal. 138; *Tyree v. Willson*, 9 Gratt. 59; *Tukey v. Smith*, 18 Me. 125. But see *Tennessee Bank v. Beatty*, 3 Sneed, 305; *Leshey v. Gardner*, 3 Watts & S. 314.

<sup>5</sup> *Clerk v. Withers*, 1 Salk. 323; *Elkin v. People*, 3 Scam. 207; *Lawrence v. Rice*, 12 Met. 533; *State v. Roberts*, 7 Halst. 114. His deputy may also be required to complete the execution of the writ. *Lofland v. Ewing*, 5 Litt. 42; *Jackson v. Collins*, 3 Cow. 89; *Tyree v. Willson*, 9 Gratt. 59; *Smith v. Bodfish*, 39 Me. 136.

<sup>6</sup> *Read v. Stevens, Coxe*, 264; *Sanderson v. Rogers*, 3 Dev. L. 38.

<sup>7</sup> *Hutchinson v. Cassidy*, 46 Mo. 431; *McArthur v. Carrie*, 32 Ala. 75; *Worten v. Howard*, 2 Smed. & M. 527; *Gaines v. De la Croix*, 6 Wall. 719;

may be ordered or permitted, in the discretion of the court. But, unless otherwise expressly provided, it is presumed that the sale must be public.<sup>1</sup>

§ 260. **Notice of the sale.** — Inasmuch as the sale is generally required to be public, it would also be a consequent requirement that due public notice should be given of the proposed sale, in order to attract purchasers. Without due notice, which usually means by publication in the newspapers,<sup>2</sup> there is not much use in having the sale public.<sup>3</sup> But since the requirement of notice is for the benefit of the debtor and owner of the goods, it seems that he may waive the notice, and permit the sale to be made without it.<sup>4</sup>

Inasmuch as the notice is intended to attract purchasers to the sale, it must be so constructed as to give to the world knowledge of every thing connected with the proposed sale which is likely to attract purchasers or is necessary to enable one to determine whether it is to his interest to attend the sale. Hence the notice should contain a reasonably specific description of the property to be sold,<sup>5</sup> an accurate description of the day and the time of the day, when the sale will

*Ellett v. Paxson*, 2 Watts & S. 418; *Neal v. Patten*, 40 Ga. 363; *Fambro v. Gantt*, 12 Ala. 298. But see *Tyrrel v. Morris*, 1 Dev. & B. Eq. 559; *Wynns v. Alexander*, 2 Dev. & B. Eq. 58.

<sup>1</sup> *Freeman on Void Judicial Sales*, § 32; 2 *Jones on Mortgages*, § 1633.

<sup>2</sup> But if it is impossible for any reason to secure publication in a newspaper, publication by posters and handbills will be sufficient. *Walton v. Harris*, 78 Mo. 489.

<sup>3</sup> *Hoffman v. Anthony*, 6 R. I. 282; *Freeman on Executions*, § 285.

<sup>4</sup> *Burroughs v. Wright*, 16 Vt. 619. See *Helmer v. Rehm*, 14 Neb. 219, as to waiver of defects in the notice by appearance in court.

<sup>5</sup> *Allen v. Cole*, 9 N. J. Eq. 286; *Stevens v. Bond*, 44 Md. 506; *Pomeroy v. Winship*, 12 Mass. 513; *Collier v. Vason*, 12 Ga. 440; *Harrison v. Cachelin*, 85 Mo. 79; *Merwin v. Smith*, 1 Green Ch. (N. J.) 182; *Frazier v. Steenrod*, 7 Iowa, 339; *Helmer v. Rehm*, 14 Neb. 219. The cases under this head generally relate to sales of real property, and in these cases greater accuracy in description can be secured than in the case of personal property; but the same general rule applies.

take place,<sup>1</sup> the place,<sup>2</sup> and the terms of the sale.<sup>3</sup> But, in all these cases, in the absence of statutory provisions a reasonable observance of these requirements is sufficient. As long as irregularities in respect to them are not material enough to deter or mislead any one, who was disposed to buy, "or to depreciate the value of the property, or to prevent it from bringing a fair price," the notice will be a sufficient compliance with the law.<sup>4</sup>

The requirements of the notice are usually regulated by statute, and where there is such a statute, its provisions will supersede the general rules which the courts would otherwise enforce in respect to this question of notice. The statutes prescribe particularly the length of time of the notice, varying of course with each State. It has been a much discussed question, where the notice is required to be given for a certain number of weeks successively, whether the statutory provision is satisfied if a publication should be made once each week for the given number of weeks, providing for the sale to take place before the lapse of the full number of weeks after the first publication. Or, to be a little more specific, if the notice is required to be published

<sup>1</sup> *Fenner v. Tucker*, 6 R. I. 551. It is sufficient to describe the time of day as being between certain hours. *Coxe v. Halstead*, 2 N. J. Eq. 311; *Burr v. Borden*, 61 Ill. 388; *Trustees v. Snell*, 19 Ill. 156; *Northrop v. Cooper*, 23 Kan. 432. See *Thornworth v. Armstrong*, 20 Minn. 464. In Missouri, it is held to be unnecessary for the notice to state the time of day, where the statute prescribes the time of day when all public sales should be conducted. *Evans v. Robbenson*, 92 Mo. 192.

<sup>2</sup> *Bottineau v. Aetna Life Ins. Co.*, 81 Minn. 125, 126; *Burnet v. Deniston*, 5 Johns. Ch. 85; *Blodgett v. Hitt*, 29 Wis. 179; *Hinson v. Hinson*, 5 Sneed, 322.

<sup>3</sup> *Farr v. Sims*, Rich. Eq. 122. This can, however, be the case only where the court authorizes the sale to be made on credit. In the absence of a special authorization, the sale has to be for cash, and, therefore, need not be stated.

<sup>4</sup> *Hoffman v. Anthony*, 6 R. I. 282; 75 Am. Dec. 701, 704, *Freeman's note*; *Mowry v. Sanborn*, 68 N. Y. 158; *Chandler v. Cook*, 2 McArthur, 176; *Gray v. Shaw*, 14 Mo. 341; *Jensen v. Weinlander*, 25 Wis. 477.

weekly for four weeks successively, and the first notice was published on the first of the month, could the sale take place any day after the twenty-first day of that month, or must twenty-eight days after the first notice expire before the sale can take place? This question has been answered by the courts variously, some of the decisions maintaining the former,<sup>1</sup> while many hold to the latter ruling.<sup>2</sup> But an excess of time in giving the notice will not affect the validity of the sale.<sup>3</sup>

It is also a doubtful question, where the statutes require a certain notice to be given of administrator's and guardian's sales, whether the failure to comply with these requirements would make the sale absolutely invalid<sup>4</sup> or only voidable, the exception to the sufficiency of the notice being required to be taken when the sale comes up in court for confirmation, and cannot be taken afterwards.<sup>5</sup> It has also been held that as against the purchaser, these statutory requirements are only directory, and, therefore, as to him, the sale cannot be avoided on account of a failure to comply with the statutory requirements.<sup>6</sup>

<sup>1</sup> *Garrett v. Moss*, 20 Ill. 554; *Olcott v. Robinson*, 21 N. Y. 150; *Wood v. Knapp*, 100 N. Y. 109; *Howard v. Hatch*, 29 Barb. 297; *Morrow v. Weed*, 4 Iowa, 77.

<sup>2</sup> *Meredith v. Chancey*, 59 Ind. 466; *Boyd v. McFarlin*, 58 Ga. 208; *In re North Whitehall Twp.*, 27 Pa. St. 156. See, also, *Smith v. Rowles*, 85 Ind. 264; *German Bank v. Stumpf*, 73 Mo. 311; *Enochs v. Miller*, 60 Miss. 19; *Bacon v. Kennedy*, 56 Mich. 329.

<sup>3</sup> *Wilson v. Scott*, 29 Ohio St. 636; *Tooke v. Newman*, 75 Ill. 215. See *Taylor v. Reid*, 103 Ill. 849.

<sup>4</sup> See, to that effect, *Thomas v. Le Baron*, 8 Met. 363; *Gernon v. Bestick*, 15 La. An. 697; *Mountour v. Purdy*, 11 Minn. 384; *Blodgett v. Hitt*, 29 Wis. 169; *Corley's Succession*, 18 La. An. 728.

<sup>5</sup> See, to that effect, *Morrow v. Weed*, 4 Iowa, 77; *Hanks v. Neal*, 44 Miss. 212; *Moffitt v. Moffitt*, 69 Ill. 641; *Hudgens v. Jackson*, 51 Ala. 514; *McNair v. Hunt*, 5 Mo. 301; *Bland v. Muncaster*, 24 Miss. 62.

<sup>6</sup> *Maddox v. Sullivan*, 2 Rich. Eq. 4 (44 Am. Dec. 234 note); *Burton v. Splers*, 92 N. C. 503; *Ware v. Bradford*, 2 Ala. 676; *Fink v. Roe*, 70 Cal. 296. But see, *contra*, *Henderson v. Hays*, 41 N. J. L. 387; *Herrick v. Ammerman*, 32 Minn. 544; *Hughes v. Watt*, 26 Ark. 228.



§ 261. **Place of sale.** — In regard to the sales of real property, the requirements as to the place of sale are more specific, but in respect to the sales of personal property, the only general requirement seems to be that the sale must be conducted in the presence of the property, in order that the prospective purchasers may examine it. And a failure to comply with this requirement will generally invalidate the sale.<sup>1</sup> But it is not necessary that the goods should be directly in front of the auctioneer, or in his hands, if they are on the same premises, and open to inspection.<sup>2</sup> And if only a part of the goods is present, the sale will be valid as to that part.<sup>3</sup>

§ 262. **Sale in parcels.** — Inasmuch as the interests of the debtor and owner of the goods will be better subserved, if the goods are sold in separate parcels, this will be required of the officer.<sup>4</sup> But if the officer ignores this requirement and sells in bulk, the sale is not absolutely void, but only voidable.<sup>5</sup> And in Pennsylvania, if a sheriff, under an

<sup>1</sup> *Murphy v. Hill*, 77 Ind. 129; *Wright v. Mack*, 95 Ind. 332; *Tibbetts v. Jageman*, 58 Ill. 43; *Stief v. Hart*, 1 N. Y. 20; *Hazard v. Burton*, 4 Harr. 62; *Ainsworth v. Greenlee*, 3 Murph. 470; *Bostick v. Keizer*, 4 J. J. Marsh. 597; *Collins v. Montgomery*, 2 Nott & McC. 392; *Gift v. Anderson*, 5 Hump. 577; *Cresson v. Stout*, 17 Johns. 116; *Newman v. Hook*, 37 Mo. 207; *Kennedy v. Clayton*, 29 Ark. 270. See, also, *Eads v. Stephens*, 63 Mo. 90. In Alabama, the sale is on that account only voidable. *Foster v. Mabe*, 4 Ala. 402.

<sup>2</sup> *McNeely v. Hart*, 8 Ired. L. 492.

<sup>3</sup> *Linnen Doll v. Doll*, 14 Johns. 222.

<sup>4</sup> *Wright v. Mack*, 95 Ind. 332.

<sup>5</sup> *Weaver v. Gayer*, 59 Ind. 195; *Jones v. Kokomo Bldg. Assn.*, 77 Ind. 340; *Nelson v. Bronnenburg*, 81 Ind. 193; *Sheehan v. Stackhouse*, 10 Mo. App. 469; *Aldrich v. Wilcox*, 10 R. I. 405; *Bell v. Taylor*, 14 Kan. 277; *Foley v. Kane*, 58 Iowa, 64; *Rector v. Hartt*, 8 Mo. App. 448; *Bouldin v. Ewart*, 63 Mo. 330; *Cunningham v. Cassidy*, 17 N. Y. 276; *Smith v. Scholtz*, 68 N. Y. 41; *Bunker v. Rand*, 19 Wis. 253. But see, *contra*, *Mays v. Wherry*, 58 Tenn. 183; *Lee v. Mason*, 10 Mich. 403; *Banks v. Bales*, 16 Ind. 423; *Catlett v. Gilbert*, 23 Ind. 614; *Tyler v. Wilkerson*, 27 Ind. 450. The most of the cases cited in this note are sales of real property, but the principle is practically the same in both classes of cases.

execution, sells goods in bulk at the direction of the judgment creditor, and there is no request from any one present to conduct the sale in any other way, the sale being in every other respect fair and honest, it is held that the sale is valid and cannot be avoided.<sup>1</sup>

§ 263. **Terms of sale.** — Unless, in the case of judicial sales, the court decrees otherwise, the general rule in execution and judicial sales is that the sale must be for cash to the highest bidder.<sup>2</sup> The title does not pass until the payment of the price.<sup>3</sup> And if payment is not made within a reasonable time after the sale, the sale may be declared void and a second sale ordered.<sup>4</sup>

§ 264. **Sale after return day.** — If a sheriff levies upon personal property while the writ of execution is still in force, he will not be prevented from selling the property, because he cannot sell before the return day of the writ. He can lawfully sell the property afterward.<sup>5</sup> Not only does he acquire a title to the property by the levy, which would alone entitle him to proceed with the sale, notwithstanding the expiration of the day for the return of the writ;<sup>6</sup> but

<sup>1</sup> *Smith v. Meldren*, 107 Pa. St. 348. See also *Furbush v. Green*, 108 Pa. St. 508.

<sup>2</sup> *Veazie v. Williams*, 8 How. 134; *Swope v. Ardery*, 5 Ind. 218; *Irby v. Irby*, 11 Lea, 165; *Richards v. Adamson*, 48 Iowa, 248; *Isler v. Andrews*, 66 N. C. 552; *Foster v. Thomas*, 21 Conn. 285; *Swatzell v. Martin*, 16 Iowa, 519; *Chapman v. Harwood*, 8 Blackf. 82.

<sup>3</sup> *Hardesty v. Wilson*, 2 Gill, 481; *Ruckle v. Barbour*, 48 Ind. 274; *Leach v. Koenig*, 55 Mo. 451. The title does not even pass, where the officer charges himself with the price. *State v. Lawson*, 14 Ark. 114.

<sup>4</sup> *Hardesty v. Wilson*, 2 Gill, 481; *Conklin v. Smith*, 7 Ired. 107; *Durnford v. Degruys*, 8 Mart. (La.) 220.

<sup>5</sup> *Spang v. Conn*, 12 Pa. St. 360; *Barnard v. Stevens*, 2 Aik. (Vt.) 429; *Lester's Case*, 4 Humph. 384; *Logsdon v. Spivey*, 54 Ill. 104; *Evans v. Governor*, 18 Ala. 659.

<sup>6</sup> *Bondurant v. Burfurd*, 1 Ala. 359; *Overton v. Perkins*, 10 Yerg. 329. The same reason seems to justify the sale under the levy, notwithstanding the expiration of the term of office of the sheriff or his death before sale. See *ante*, § 258.

the levy and sale are considered only parts of one transaction, so that he who does the one is authorized to complete the transaction.<sup>1</sup>

§ 265. **Adjournment of the sale.**— In most of the States, it is permitted for officers charged with judicial and execution sales, in the exercise of a wise discretion, to adjourn the sale to a subsequent day, in order to protect or further the interests of the debtor.<sup>2</sup> And if there was no one present at the sale but the plaintiff in execution, it is the duty of the officer to postpone the sale,<sup>3</sup> even against the objections of the plaintiff.<sup>4</sup> But the power to adjourn the sale can only be exercised by the officer; it cannot be delegated to any one else.<sup>5</sup>

The adjournment may be to a different place, as well as to a different time.<sup>6</sup> Some sort of notice must be given of the adjourned sale; and while it would seem necessary to advertise it after the same manner and to the same extent as was the original sale, and such is the opinion of many of the courts;<sup>7</sup> it is also held that the public proc-

<sup>1</sup> *Rudd v. Johnson*, 5 Litt. 19; *Smith v. Spencer*, 3 Ired. 256; *Hamilton v. Ward*, 4 Tex. 363; *Neillson v. Churchill*, 5 Dana, 338.

<sup>2</sup> *Swartzell v. Martin*, 16 Iowa, 519; *Strong v. Cotton*, 1 Wis. 471; *Kelly v. Green*, 63 Pa. St. 299; *Den v. Zellers*, 2 Halst. (N. J.) 153; *Jewett v. Guyer*, 38 Vt. 209; *Goddard v. Sawyer*, 9 Allen, 78; *Warren v. Leland*, 9 Mass. 265; *Russell v. Richards*, 11 Me. 371; *Aldrich v. Wilcox*, 10 R. I. 405; *Reynolds v. Hoxsie*, 6 R. I. 463; *Aldrich v. Grimes*, 14 R. I. 219; *Blossom v. Railroad Co.*, 3 Wall. 196, 209; *Collier v. Whipple*, 13 Wend. 229; *Thornton v. Boyden*, 31 Ill. 200; *Kelly v. Israel*, 11 Paige Ch. 152; *Richards v. Holmes*, 18 How. 147.

<sup>3</sup> *McMichael v. McDermott*, 17 Pa. St. 353; *Strong v. Catton*, 1 Wis. 471.

<sup>4</sup> *McDonald v. Neillson*, 2 Cow. 189.

<sup>5</sup> *Wolf v. Van Metre*, 27 Iowa, 348.

<sup>6</sup> *Richards v. Holmes*, 18 How. 143; *Jewett v. Guyer*, 38 Vt. 209.

<sup>7</sup> *Thornton v. Boyden*, 31 Ill. 200; *Montgomery v. Barrow*, 19 La. An. 169; *Williams v. Barlow*, 49 Ga. 530; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130; *Patten v. Stewart*, 26 Ind. 395; *Enloe v. Miles*, 12 Smed. & M. 147. But see *Dexter v. Shepard*, 117 Mass. 480.

lamation of the adjournment at the time of the original sale, with due notice of the time and place of the adjourned sale, will be a sufficient notice.<sup>1</sup>

But while the foregoing is the rule of the majority of the courts, a minority of the courts hold that the officer is not authorized in the absence of express grant of power to adjourn a sale,<sup>2</sup> and if the officer should be prevented, by the want of bidders, from making the sale, he should make a return with a statement of the facts, and await the issue of a writ of *venditioni exponas*.<sup>3</sup>

<sup>1</sup> *Allen v. Cole*, 9 N. J. Eq. 286; *Corriell v. Ham*, 4 G. Greene (Iowa), 455; *Coxe v. Halstead*, 1 Green Ch. (N. J.) 216. See also *Richards v. Holmes*, 18 How. 143.

<sup>2</sup> *Enloe v. Miles*, 20 Miss. 147; *Cash v. Toazer*, 1 Watts & S. 519.

<sup>3</sup> *Reynolds v. Nye*, 1 Free. (Miss.) Ch. 462; *Keightley v. Birch*, 3 Camp. 521; *United States v. Drennen*, Hemp. (U. S.) 320.

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## CHAPTER XVIII.

### SALES BY AGENTS AND PERSONAL REPRESENTATIVES.

**SECTION 268.** The general principles of agency as applied to sales of personal property.

269. Power to sell, when implied — Scope of power.

270. Agent cannot act for himself in the same transaction.

271. Brokers and factors or commission merchants distinguished.

272. The powers of the broker.

273. The powers of the factor or commission merchant.

274. Sales by pledgees.

275. Sale by master of vessel.

276. Sales by trustees.

277. Sales by executors and administrators.

278. Sales by guardians.

§ 268. The general principles of agency as applied to sales of personal property. — It will not be necessary to present here a general exposition of the law of agency, for such a discussion more properly belongs to the subject of contracts, and it may be presumed that the reader has already become acquainted with the general principles of agency. It will suffice in this connection to state that one may sell and buy through an agent, and that a sale or purchase by a duly authorized agent is always binding on the principal. The chief question in all such cases is whether the supposed agent is duly authorized. Agents for these purposes may receive their authority by express grant, by implication, and by ratification of an otherwise unlawful act. It is not necessary to dwell on the first source of authority; nor is it necessary to refer to the last, except to say that if one undertakes to sell or buy for another, without having authority to do so, the supposed principal

becomes bound by the contract when he has accepted the benefits of the contract, the consideration or the goods, according as he is represented to be the seller or buyer.<sup>1</sup> But it is doubtful whether the receipt of the benefits of the sale will serve as a ratification of the warranty which the agent gave, as well as a ratification of the unauthorized sale; some of the cases holding that the ratification would include the warranty,<sup>2</sup> while other cases hold that there must be an express ratification of the warranty.<sup>3</sup>

§ 269. Power to sell, when implied — Scope of power.

The power to sell may be implied from permitting the alleged agent to assume such an attitude to the owner of the goods, or to the goods themselves, as to lead a reasonably prudent man to believe that the supposed agent has the authority to sell; and in such a case the principal will be estopped from denying his authority, as against a purchaser who relied upon this appearance of authority.<sup>4</sup>

<sup>1</sup> *Cochran v. Chitwood*, 59 Ill. 53; *Barkley v. Rensselaer, &c., R. R. Co.*, 71 N. Y. 205; *Sartwell v. Frost*, 122 Mass. 184; *Jones v. Atkinson*, 68 Ala. 167; *Herring v. Skaggs*, 78 Ala. 446; *McDowell v. McKenzie*, 65 Ga. 630; *Parish v. Reeve*, 63 Wis. 315; *Bearce v. Bowker*, 115 Mass. 129. See *Carson v. Cummings*, 69 Mo. 325; *Moody v. Blake*, 177 Mass. 23. But the intention to ratify the unauthorized acts must be clearly shown; and if the evidence is doubtful, the question must be left to the jury. *Abbott v. May*, 50 Ala. 97; *Crooker v. Appleton*, 25 Me. 181; *Bryant v. Moore*, 26 Me. 84; *Estevez v. Purdy*, 66 N. Y. 446; *Penn., &c., Steam Nav. Co. v. Dandridge*, 8 G. & J. 248; *Johnson v. Craig*, 21 Ark. 533; *Walker v. Walker*, 5 Heisk. 425; *Farwell v. Meyer*, 35 Ill. 40; *Burr v. Howard*, 58 Ga. 564; *Barnard v. Wheeler*, 24 Me. 412; *Hortons v. Townes*, 6 Leigh, 47.

<sup>2</sup> *Cochran v. Chitwood*, 59 Ill. 53. Compare *Cooley v. Perrine*, 41 N. J. L. 322. See, also, *Joslin v. Miller*, 14 Neb. 91; *New England, &c., Co. v. Hendrickson*, 13 Neb. 575; *Elwell v. Chamberlain*, 31 N. Y. 641, where it is held that a ratification of the agent's unauthorized act involves an adoption of all the instrumentalities employed by the agent to effectuate the sale or other act.

<sup>3</sup> *Smith v. Tracy*, 86 N. Y. 79. See *Cooley v. Perrine*, 41 N. J. L. 322.

<sup>4</sup> *Hansell v. Levy*, 5 Del. 407; *Rockford, &c., R. R. Co. v. Wilcox*, 66 Ill. 417; *Franklin v. Globe, &c., Ins. Co.*, 52 Mo. 461; *Bank v. Dan-*

The scope of the power to sell will depend in many cases on the character of the agency. If it be a general agency, for example, the power to sell will imply the power to warrant the quality of the goods.<sup>1</sup> So, also, is a general agent authorized by implication to make a sale, subject to the condition that the subject-matter of the sale shall be tested and returned if it proved to be unsatisfactory.<sup>2</sup> And any agent, whether general or special, who sells by sample, has the authority to warrant the quality of the goods.<sup>3</sup> But the general rule is that a special agent has not the implied authority to warrant,<sup>4</sup> although it has been held that one authorized to sell a horse for the owner is

dridge, 12 Wheat. 64; *Ketchum v. Verdell*, 42 Ga. 534; *Singer, &c., Co. v. Holdfoht*, 86 Ill. 455; *South, &c. Ala. R. R. Co. v. Henlein*, 52 Ala. 606; *Hull v. Jones*, 69 Mo. 587; *Columbia, &c., Bridge Co. v. Geisse*, 38 N. J. L. 39; *Lovell v. Williams*, 125 Mass. 439; *Brooks v. Jameson*, 55 Mo. 505; *Engh v. Greenbaum*, 4 Th. & C. 426; *Rice v. Groffman*, 56 Mo. 434; *Haughton v. Manner*, 55 Mich. 323; *Shaffer v. Sawyer*, 123 Mass. 294.

<sup>1</sup> *Bradford v. Bush*, 10 Ala. 386; *Ezell v. Franklin*, 2 Sneed, 236; *Hunter v. Jameson*, 6 Ired. 252; *Applegate v. Moffitt*, 60 Ind. 104; *Croom v. Shaw*, 1 Fla. 211; *Schuchardt v. Allen*, 1 Wall. 359; *Victor, &c., Co. v. Rheinschild*, 25 Kan. 534; *Palmer v. Hatch*, 46 Mo. 585; *Dayton v. Hooglund*, 39 Ohio St. 671; *Huguley v. Norris*, 65 Ga. 666; *Fay v. Richmond*, 43 Vt. 25; *Deming v. Chase*, 48 Vt. 332; *Boothby v. Scales*, 27 Wis. 626; *Murray v. Brooks*, 41 Iowa, 45; *Tice v. Gallup*, 2 Hun, 446; *Smith v. Tracy*, 36 N. Y. 82; *Nelson v. Cowing*, 6 Hill, 336; *Bryant v. Moore*, 26 Me. 84; *Randall v. Kehlror*, 60 Me. 37; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Dingle v. Hare*, 7 C. B. (N. S.) 145; *McCormick v. Kelly*, 28 Minn. 135; *Deering v. Thom*, 29 Minn. 120; *Talmage v. Bierhouse*, 108 Ind. 270. But the general agent has no authority to give a warranty where it is not customary or it is unreasonable to give one. *Smith v. Tracy*, 36 N. Y. 79; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Henning v. Skaggs*, 73 Ala. 446.

<sup>2</sup> *McCormick v. Kelly*, 28 Minn. 135; *Deering v. Thom*, 29 Minn. 120; *Boothby v. Scales*, 27 Wis. 626; *The Monte Allegre*, 9 Wheat. 616; *Pit-sinowski v. Beardsley*, 87 Iowa, 9; *Oster v. Mickley*, 28 N. W. Rep. (Minn.) 710; *Murray v. Brooks*, 41 Iowa, 45.

<sup>3</sup> *Murray v. Smith*, 4 Daly, 277; *Schuchardt v. Allen*, 1 Wall. 359; *Dayton v. Hooglund*, 39 Ohio St. 671; *Andrews v. Kneeland*, 6 Cow. 354.

<sup>4</sup> *Perrine v. Cooley*, 42 N. J. L. 623; *Decker v. Frederick*, 47 N. J. L. 469; *Brady v. Todd*, 9 C. B. (N. S.) 592; *Scott v. McGrath*, 7 Barb. 53.

impliedly authorized to warrant its soundness, unless expressly forbidden.<sup>1</sup>

If the agent has the express authority to warrant with limitations, he is precluded from making a warrant without these limitations, and the principal will not be bound by any unauthorized warranty, although it is ordinarily implied, if the purchaser knew of the express limitations on the power to warrant.<sup>2</sup> And in all of these cases of implied warranty, it is a warranty of quality. The agent is not impliedly authorized to make any unusual warranty.<sup>3</sup>

The agent who is authorized to make a sale may ordinarily rescind the sale and make a new sale, whenever and under the same conditions that the principal could have done so.<sup>4</sup> The power to sell does not imply the power to sell on any other terms than for cash.<sup>5</sup> And if the power to sell on credit be given, the credit must be a reasonable one.<sup>6</sup> The power to sell does not include the power to pay commissions,<sup>7</sup> nor the power to collect the price, unless the agent has possession of the goods when he makes the sale and delivers them.<sup>8</sup>

<sup>1</sup> *Denning v. Chase*, 48 Vt. 382; *Tice v. Gallup*, 2 Hun, 446; *Skinner v. Gunn*, 9 Port. (Ala.) 305; *Cocke v. Campbell*, 13 Ala. 286; *Bradford v. Bush*, 10 Ala. 390; *Gaines v. McKinley*, 1 Ala. 446; *Milburn v. Belloni*, 84 Barb. 607.

<sup>2</sup> *Wood Mowing, &c., Co. v. Crow*, 30 N. W. Rep. (Iowa), 609.

<sup>3</sup> *Palmer v. Hatch*, 46 Mo. 585; *Anderson v. Bruner*, 112 Mass. 14.

<sup>4</sup> *Scott v. Wells*, 6 Watts & S. 357; *Victor, &c., Co. v. Rheinschild*, 25 Kan. 534; *Bloomer v. Denman*, 12 Ill. 240; *Saladin v. Mitchell*, 45 Ill. 79; *Luke v. Grigg*, 30 N. W. Rep. (Dak.) 170; *Adrain v. Lane*, 13 S. C. 188; *Anderson v. Coonley*, 21 Wend. 279.

<sup>5</sup> *Burks v. Hubbard*, 69 Ala. 379; *Scoby v. Wood*, 59 Tenn. 66; *Taylor v. Starkey*, 59 N. H. 142; *Powell v. Henry*, 27 Ala. 612; *Buckwalter v. Craig*, 55 Mo. 71; *Victor, &c., Co. v. Heller*, 44 Wis. 265; *Stewart v. Woodward*, 50 Vt. 78; *Flanagan v. Alexander*, 50 Mo. 51; *Greenwood v. Burns*, 50 Mo. 52; *Wheeler, &c., Co. v. Glvan*, 65 Mo. 89.

<sup>6</sup> *Brown v. Central Land Co.*, 42 Cal. 257.

<sup>7</sup> *Atlee v. Fink*, 75 Mo. 100.

<sup>8</sup> *Clark v. Smith*, 88 Ill. 298; *Wright v. Cabot*, 89 N. Y. 570; *Graham v. Duckwall*, 8 Bush, 12; *Korneman v. Monaghan*, 24 Mich. 36; *McKindly*



The power to sell is not implied from the power to obtain an offer on goods.<sup>1</sup> Nor is the power to sign a bill of sale implied from a power to "close a bargain."<sup>2</sup> Nor can the power to sell one thing give by implication the power to sell another.<sup>3</sup>

A special agent can exercise his power only within the strict limitations of the grant of power; so that a power to sell on a particular day does not imply the power to sell on some later day;<sup>4</sup> nor can he sell at a different price from the one stipulated.<sup>5</sup>

§ 270. **Agent cannot act for himself in the same transaction.**— While the agent is acting for his principal he is not permitted to so act for himself in regard to the subject-matter of the sale, as to acquire interests therein antagonistic to his principal.<sup>6</sup> Thus the agent for the seller cannot

*v. Dunham*, 55 Wis. 515; *Higgins v. Moore*, 34 N. Y. 417; *Chambers v. Short*, 79 Mo. 204; *Greenhood v. Keaton*, 9 Ill. App. 188; *Bernshouse v. Abbott*, 45 N. J. L. 531; *Kohn v. Washer*, 64 Tex. 131; *Butler v. Dorman*, 68 Mo. 298; *Greenleaf v. Egan*, 30 Minn. 316; *Janney v. Boyd*, 30 Minn. 319; *Abrahams v. Weiller*, 87 Ill. 179; *Seiple v. Irwin*, 30 Pa. St. 513; *Crosby v. Hill*, 39 Ohio St. 100; *Higgins v. Moore*, 34 N. Y. 417; *Mann v. Robinson*, 19 W. Va. 49; *Alexander v. Jones*, 64 Iowa, 207; *Yerbey v. Grigsby*, 9 Leigh, 887; *Hackney v. Jones*, 8 Humph. 612; *Goodale v. Wheeler*, 11 N. H. 424; *Hoskins v. Johnson*, 5 Sneed, 469; *Higgins v. Moore*, 6 Bosw. 344; *Johnson v. McGruder*, 15 Mo. 365; *Peck v. Harriott*, 6 Serg. & R. 146; *Harris v. Simmerman*, 81 Ill. 413.

<sup>1</sup> *Levi v. Booth*, 58 Md. 305; *Dempsey v. West*, 69 Ill. 613.

<sup>2</sup> *Duffy v. Hobson*, 40 Cal. 240.

<sup>3</sup> *DeCordova v. Knowles*, 37 Tex. 19.

<sup>4</sup> *Mathews v. Sowle*, 12 Neb. 398; *Bliss v. Clark*, 16 Gray, 60; *Reed v. Baggott*, 5 Ill. App. 257; *Proudfoot v. Wightman*, 78 Ill. 553; *Cupples v. Whelan*, 61 Mo. 588.

<sup>5</sup> *Holbrook v. McCarthy*, 61 Cal. 216.

<sup>6</sup> *Devall v. Burbridge*, 4 Watts & S. 305; *Bennett v. Van Syckle*, 4 Duer, 462; *Smeltzer v. Lombard*, 57 Iowa, 294; *Gilman, &c., Co. v. Kelly*, 77 Ill. 426; *Eldridge v. Walker*, 60 Ill. 280; *Gillenwaters v. Miller*, 49 Miss. 150; *Grumley v. Webb*, 44 Mo. 444; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Haynie v. Johnston*, 71 Ind. 394; *Wilber v. Hough*, 49 Cal. 290; *Dieringer v. Meyer*, 42 Wis. 311; *Porter v. Woodruff*, 36 N. J.

buy the property sold,<sup>1</sup> although it would be permissible, of course, for him to buy direct from his principal, and with the latter's full knowledge and assent.<sup>2</sup> And in any case of a purchase by the seller's agent, the courts will treat it as a case of constructive fraud, if the agent does not make a full and complete disclosure to the principal of his interest as a purchaser, and of all the facts connected with his purchase.<sup>3</sup>

Eq. 174; *Cadwallader v. West*, 48 Mo. 488; *Greenfield Sav. Bank v. Simmons*, 188 Mass. 415; *Freeman v. Hartman*, 45 Ill. 57; *Davis v. Hamlin*, 108 Ill. 39; *Fairman v. Bavin*, 29 Ill. 75; *Case v. Carroll*, 35 N. Y. 385; *Hill v. Frazier*, 22 Pa. St. 320.

<sup>1</sup> *Eldredge v. Walker*, 60 Ill. 230; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Martin v. Moulton*, 8 N. H. 504; *Cook v. Berlin Woolen Mills*, 43 Wis. 483; *Taussig v. Hart*, 49 N. Y. 301; *s. c.* 58 N. Y. 435; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Tynes v. Grimstead*, 1 Tenn. Ch. 508; *White v. Ward*, 26 Ark. 445; *Ames v. Port Huron, &c., Co.*, 11 Mich. 146; *Ingle v. Hartmann*, 37 Iowa, 274; *Marsh v. Whitmore*, 21 Wall. 178; *Jeffries v. Wiester*, 2 Sawy. 135; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Scott v. Mann*, 36 Tex. 157; *Clute v. Barron*, 2 Mich. 192; *Parker v. Vose*, 45 Me. 54; *Ruckman v. Beigholz*, 37 N. J. L. 437; *Bain v. Brown*, 56 N. Y. 285; *Stewart v. Mather*, 32 Wis. 344; *Bank v. Farmers' L. & T. Co.*, 16 Wis. 609; *Remick v. Butterfield*, 31 N. H. 70; *Kerfoot v. Hyman*, 52 Ill. 512; *Adams v. Sayer*, 76 Ala. 509. And the sale is none the less voidable because it was made at auction and for full value and was free from every suspicion of unfairness. *Scott v. Freeland*, 15 Miss. 409; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Mason v. Martin*, 4 Md. 124; *Newcomb v. Brooks*, 16 W. Va. 32; *Martin v. Martin*, 12 Ired. 266; *Patton v. Thompson*, 2 Jones Eq. 285; and even where he is authorized to sell for a stipulated price, and he paid that sum. *Porter v. Woodruff*, 36 N. J. Eq. 174; *Ruckman v. Beigholz*, 37 N. J. L. 437; *Peekham Iron Co. v. Harper*, 41 Ohio St. 100.

<sup>2</sup> *Uhlick v. Muhlke*, 61 Ill. 499; *Ingle v. Hartman*, 37 Iowa, 274; *Jeffries v. Wiester*, 2 Sawy. 135; *Fisher's Appeal*, 34 Pa. St. 29; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Michoud v. Girod*, 4 How. 503; *Buell v. Buckingham*, 16 Iowa, 184.

<sup>3</sup> *Baker v. Whiting*, 3 Sumner, 475; *Gaines v. Allen*, 58 Mo. 537; *Provoost v. Gratz*, 6 Wheat. 481; *Comstock v. Ames*, 1 Abb. App. 411; *Dunne v. English*, L. R. 18 Eq. 524; *Grumley v. Webb*, 44 Mo. 444; *White v. Ward*, 26 Ark. 445; *Ackenburgh v. McCool*, 36 Ind. 473; *Leake v. Sutherland*, 25 Ark. 219; *Armstrong v. Elliott*, 29 Mich. 485; *Lafferty v. Jelly*, 22 Ind. 471; *Smith v. Townsend*, 109 Mass. 500; *Mills v. Mills*, 26 Conn. 213; *Rubidoux v. Parks*, 48 Cal. 215; *Mott v. Harrington*, 12 Vt. 199;

On the other hand, the buyer's agent cannot as agent buy his own property for his principal.<sup>1</sup> Nor can the buyer's agent, while acting as an agent, enter into competition with his principal by buying the same sort of goods for himself. And all such property purchased by himself will be held by him in trust for his principal.<sup>2</sup> The agent cannot make any profit out of the transactions in which he is engaged as the agent of another beyond the compensation for his services. And if he should, secretly or indirectly, make any additional profit out of the transaction, it would be a fraud upon his principal, and he could be compelled to turn it over to the principal.<sup>3</sup> In all these cases, the law recognizes the moral

*Bartholomew v. Leach*, 7 Watts, 472; *Persch v. Quiggle*, 57 Pa. St. 247; *Beeson v. Beeson*, 9 Pa. St. 279; *Uhlich v. Muhlke*, 61 Ill. 499; *Ingle v. Hartman*, 37 Iowa, 274; *Stewart v. Mather*, 32 Wis. 344; *Collins v. Case*, 23 Wis. 230; *Cook v. Berlin Woolen Mills Co.*, 43 Wis. 433; *Conditt v. Blackwell*, 22 N. J. Eq. 481; *Taussig v. Hart*, 49 N. Y. 301; *Lawrence v. Maxwell*, 6 Lans. 469; *Reed v. Warner*, 5 Paige, 650; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Nesbitt v. Lockman*, 34 N. Y. 167; *Brown v. Post*, 1 Hun, 304; *Brock v. Barnes*, 40 Barb. 521.

<sup>1</sup> *Bischoffsheim v. Baltzer*, 20 Fed. Rep. 890; *Keighler v. Savage Mfg. Co.*, 12 Md. 383; *Beal v. McKiernan*, 6 La. (o. s.) 407; *Ely v. Hanford*, 65 Ill. 267; *Tewksbury v. Spruance*, 75 Ill. 187; *Taussig v. Hart*, 58 N. Y. 425; *Conkey v. Bond*, 36 N. Y. 427.

<sup>2</sup> *Barlzler v. Story*, 39 Tex. 354; *Fisher v. Krutz*, 9 Kan. 501; *Eshleman v. Lewis*, 49 Pa. St. 410; *Rose v. Hayden*, 35 Kan. 106; *Ringo v. Bluns*, 10 Pet. 269; *Wolford v. Herrington*, 74 Pa. St. 311; *Von Huster v. Spengeman*, 17 N. J. Eq. 185; *Switzer v. Skiles*, 8 Ill. 529; *Firestone v. Firestone*, 49 Ala. 128; *Matthews v. Light*, 32 Me. 305; *Church v. Sterling*, 16 Conn. 388; *Reed v. Warner*, 5 Paige, 650; *Welford v. Chancellor*, 5 Gratt. 39; *McMurry v. Mobley*, 39 Ark. 309.

<sup>3</sup> *Cottom v. Halliday*, 59 Ill. 176; *Mason v. Bauman*, 62 Ill. 76; *Collins v. Case*, 23 Wis. 230; *Nat. Bank v. Seward*, 106 Ind. 264; *Ackenburg v. McCool*, 36 Ind. 473; *Dutton v. Willner*, 52 N. Y. 312; *Bain v. Brown*, 56 N. Y. 235; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Jeffries v. Wiester*, 2 Sawy. 135; *Smith v. Stephenson*, 45 Iowa, 645; *Moore v. Mandlebaum*, 8 Mich. 433; *Kerfoot v. Hyman*, 52 Ill. 512; *Campbell v. Penn. Life Ins. Co.*, 2 Whart. 53; *Morris' Appeal*, 71 Pa. St. 106; *Leake v. Sutherland*, 25 Ark. 219; *White v. Ward*, 26 Ark. 445; *Rhea v. Puryear*, 26 Ark. 344; *Whelan v. McCreary*, 64 Ala. 319; *Krutz v. Fisher*, 8 Kan. 90; *Kent v. Priest*, 86 Mo. 476; *Northern Pac. R. R. Co. v. Kindred*, 14 Fed. Rep. 77;

inability of the average man to do justice to his principal while dealing with himself as the opposing principal in the contract of sale. It is to the interest of the seller to sell at the highest price, and of the buyer to buy at the lowest price; and no ordinary man can act justly and with the utmost success as vendor and vendee in the same transaction, and self-interest will almost invariably compel him to sacrifice the interests of his principal.

§ 271. **Brokers and factors or commission merchants distinguished.**— A broker is one whose business it is to secure purchases or to make sales for others, without receiving possession of the subject-matter of sale, and there are as many kinds of brokers as there are kinds of subject-matter of sales.<sup>1</sup> The factor or commission merchant is one who receives into his possession the goods, wares and merchandise of others for the purpose of sale or exchange, under the instructions of the principal or the usages of trade.<sup>2</sup> The chief distinction between brokers and factors

*Moinett v. Day*, 57 Tenn. 431; *Clark v. Anderson*, 10 Bush. 99; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Coussin's Appeal*, 79 Pa. St. 220; *Bartholomew v. Leach*, 7 Watts, 472; *Judevine v. Hardwick*, 49 Vt. 180; *Byrd v. Hughes*, 84 Ill. 174; *Barton v. Moss*, 32 Ill. 50; *Segar v. Edwards*, 11 Leigh. 218; *Bell v. Bell*, 3 W. Va. 183; *Stoner v. Weiser*, 24 Iowa, 434; *Oliver v. Piatt*, 3 How. 333; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Love v. Hoss*, 62 Ind. 255; *Lafferty v. Jelly*, 22 Ind. 471.

<sup>1</sup> *Coddington v. Goddard*, 16 Gray, 436; *Saladin v. Mitchell*, 45 Ill. 79; *Graham v. Duckwall*, 8 Bush, 12; *Barnard v. Monnot*, 16 How. Pr. 440; *Pott v. Turner*, 6 Bing. 702; *State v. Duncan*, 16 Lea, 75; *Bromley v. Elliott*, 38 N. H. 287; *Creveling v. Wood*, 95 Pa. St. 152; *Portland v. O'Neill*, 1 Oreg. 218; *Keys v. Johnson*, 68 Pa. St. 42; *White v. Brownell*, 3 Abb. Pr. (N. S.) 318; *Beal v. McKiernan*, 6 La. (O. S.) 407; *Hinckley v. Arey*, 27 Me. 362.

<sup>2</sup> *Baring v. Corsie*, 2 B. & Ald. 143; *Graham v. Duckwall*, 8 Bush. 12; *Perkins v. State*, 50 Ala. 154; *Edgerton v. Michels*, 66; *Burton v. Goodspeed*, 69 Ill. 237; *Denney v. Wright*, 60 Wis. 733; *Bromley v. Elliott*, 38 N. H. 287; *Cotton v. Hiller*, 52 Miss. 7; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Taylor v. Wells*, 3 Watts, 65; *Winne v. Hammond*, 37 Ill. 99; *Slack v. Tucker*, 23 Wall. 321; *Hopkirk v. Bell*, 3 Cranch, 454; *Duguid v.*

or commission merchants is that the broker makes his sales without receiving the possession of the goods, while the factor or commission merchant is given the possession of the goods to be sold, and is consequently charged with the care of the goods until a sale is effected. The broker is purely an agent to sell, while the factor is a bailee to sell.<sup>1</sup> The names do not signify much, in determining the character of the agent; and, although an agent may call himself a broker, he is a factor or commission merchant, if he has possession of the goods which he is to sell.<sup>2</sup>

§ 272. **The powers of the broker.**— When one employs a broker to buy or sell for him, he impliedly authorizes him to make whatever contract is justified by well-established usage in the market in which the broker is carrying on his business, whether the usage is known to the principal or not.<sup>3</sup> And, unless restricted by express instructions or

Edwards, 50 Barb. 288; Ladd v. Arkell, 37 N. Y. Sup. Ct. 35; Higgins v. Moore, 34 N. Y. 418; Ward v. Brandt, 11 Martin (La.), 311; Blood v. Palmer, 11 Me. 414. A common carrier may be a factor, where he is not only intrusted with the possession of goods for the purpose of transportation, but also for the purpose of sale in the port of destination. He becomes a factor as soon as the transit comes to an end, and he undertakes the duty of selling the goods. Harrington v. McShave, 2 Watts, 443; Taylor v. Wells, 3 Watts, 65; Williams v. Nichols, 18 Wend. 58; Emery v. Hersey, 4 Greenl. 407; Stone v. Waitt, 31 Me. 409; Kemp v. Coughtry, 11 Johns. 107.

<sup>1</sup> Baring v. Corsie, 2 B. & Ald. 143; Slack v. Tucker, 23 Wall. 321; Higgins v. Moore, 34 N. Y. 417; Saladin v. Mitchell, 45 Ill. 79; Stollenwerck v. Thacher, 115 Mass. 224; Fisher v. Brown, 104 Mass. 259; Markham v. Jandon, 41 N. Y. 235; Graham v. Duckwall, 8 Bush. 12; Barry v. Boninger, 46 Md. 69; James' Appeal, 89 Pa. St. 54; Bernshouse v. Abbott, 16 Vroom, 531; Rutenberg v. Main, 47 Cal. 213.

<sup>2</sup> Henry v. Philadelphia Warehouse Co., 81 Pa. St. 76; Wood v. Hayes, 15 Gray, 375; Morton v. Scull, 23 Ark. 289; Morey v. Webb, 65 Barb. 22; Talmage v. Nevins, 2 Sweeney, 38; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Andrews v. Kneeland, 6 Cow. 354; Jeffrey v. Bigelow, 13 Wend. 518; Rutenberg v. Main, 47 Cal. 213.

<sup>3</sup> Robinson v. Mollett, L. R. 7 H. L. 836; Young v. Cole, 3 Bing. N. C. 724; Bowring v. Shepard, L. R. 6 Q. B. 309; Scutance v. Hawley, 13

a well-established usage, the broker has the power to make use of all the means necessary to make the sale in an advantageous manner.<sup>1</sup> But usage never controls, where there are express restrictions, except as to third persons who deal with the broker without knowledge of the express restrictions.<sup>2</sup> But usage will never authorize a broker to bind his principal in the doing of an unlawful or an immoral act,<sup>3</sup> such as dealing in options.<sup>4</sup>

The broker ordinarily has power to sell by sample, and to warrant correspondence of the bulk with sample.<sup>5</sup> He has not the power to sell on credit, unless he can show a usage or express authority.<sup>6</sup> He is also not authorized to receive payment for the goods. And if the party buying

C. B. (N. S.) 458; *Rosenstock v. Tormey*, 32 Md. 169; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Walker v. Walker*, 5 Heisk. 425; *White v. Fuller*, 67 Barb. 267; *Gilchrist v. Brooklyn Mfg. Co.*, 66 Barb. 390; *Wanless v. McCandless*, 38 Iowa, 20; *Butler v. Dorman*, 68 Mo. 298; *Day v. Holmes*, 108 Mass. 306; *Gallup v. Lederer*, 1 Hun, 282; *Baker v. Drake*, 66 N. Y. 518; *Higgins v. Moore*, 34 N. Y. 417; *Bailey v. Bensley*, 87 Ill. 566; *Rich v. Boyce*, 39 Md. 314; *Sumner v. Stewart*, 69 Pa. St. 321.

<sup>1</sup> *Wilkinson v. Churchill*, 114 Mass. 184; *East India Co. v. Hensley*, 1 Esp. 111.

<sup>2</sup> *Scott v. Rogers*, 31 N. Y. 676; *Pierce v. Thomas*, 4 E. D. Smith, 354.

<sup>3</sup> *Rumsey v. Berry*, 65 Me. 574; *Yerkes v. Salomon*, 11 Hun, 473; *Lyon v. Culbertson*, 83 Ill. 33; *Foster v. State*, 45 Ark. 361; *Com. v. Cooper*, 130 Mass. 285; *Ruchizky v. DeHaven*, 97 Pa. St. 202; *Evans v. Waln*, 71 Pa. St. 69; *Trist v. Child*, 21 Wall. 441; *Steers v. Lashley*, 6 T. R. 61; *Brown v. Turner*, 7 T. R. 631; *Irwin v. Williar*, 110 U. S. 499; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Fareira v. Gabell*, 89 Pa. St. 89; *Farnsworth v. Hemmer*, 1 Allen, 494; *Pointer v. Smith*, 7 Heisk. 137; *Gregory v. Wilson*, 36 N. J. L. 315; *Pearce v. Foote*, 113 Ill. 228; *Gregory v. Wendell*, 39 Mich. 337; *s. c.* 40 Mich. 432.

<sup>4</sup> *Stewart v. Garrett*, 4 Atl. Rep. (Md.) 399. See *Kirkpatrick v. Adams*, 20 Fed. Rep. 237; *Bennett v. Covington*, 22 Fed. Rep. 816.

<sup>5</sup> *The Monte Allegre*, 9 Wheat. 616; *Boorman v. Jenkins*, 12 Wend. 566; *Waring v. Mason*, 18 Wend. 425; *Andrews v. Kneeland*, 6 Cow. 534. See also *Forcheimer v. Stewart*, 65 Iowa, 594. But see *Dodd v. Farlow*, 11 Allen, 426.

<sup>6</sup> *White v. Fuller*, 67 Barb. 267; *Wiltshire v. Slms*, 1 Camp. 258; *Boorman v. Brown*, 3 Q. B. 511; *Henderson v. Barnewell*, 1 Y. & Jerv. 387.

from the broker pays him the price, he does so at his peril.<sup>1</sup>

The broker, who is authorized to sell, has no implied authority to rescind the sale;<sup>2</sup> nor has the broker, who is empowered to buy, the implied power to sell again.<sup>3</sup> Without express authority, brokers cannot appoint sub-agents, and turn the business over to them.<sup>4</sup> And like all other agents he can neither buy from nor sell to himself.<sup>5</sup>

Until the sale is completed, the broker is the agent of the party who employed him, and for whom he acted; but when the sale is consummated, he becomes the agent of both seller and buyer, in order to enable him to make a memorandum of the sale, which will satisfy the requirements of the statute of frauds, and hold both parties liable

<sup>1</sup> *Baring v. Corrie*, 2 B. & Ald. 137; *Graham v. Duckwall*, 8 Bush, 12; *Gallup v. Lederer*, 3 Th. & C. 710; *Bassett v. Lederer*, 3 Th. & C. 671; *Doubleday v. Kress*, 50 N. Y. 410; *Saladin v. Mitchell*, 45 Ill. 79; *Seiple v. Irwin*, 30 Pa. St. 518; *Kymer v. Suwerkropp*, 1 Camp. 109; *Morris v. Ruddy*, 20 N. J. Eq. 236; *Peck v. Harriott*, 6 Serg. & R. 149; *Bliss v. Bliss*, 7 Bosw. 339; *Higgins v. Moore*, 34 N. Y. 417; *Rutenberg v. Main*, 47 Cal. 213; *Campbell v. Harsell*, 1 Stark. 233.

<sup>2</sup> *Saladin v. Mitchell*, 45 Ill. 79.

<sup>3</sup> *McNeilly v. Cont. Ins. Co.*, 66 N. Y. 23; *Roach v. Turk*, 9 Heisk. 708.

<sup>4</sup> *Cochran v. Irlam*, 2 M. & S. 301; *Locke's Appeal*, 72 Pa. St. 491; *Henderson v. Barnewell*, 1 Y. & Jerv. 387. But this prohibition does not apply to the appointment of clerks and other ministerial agents, where they are not given the power to act independently or in their own discretion. *Williams v. Woods*, 16 Md. 220; *Elwell v. Chamberlain*, 2 Bosw. 230; *Commercial Bank v. Norton*, 1 Hill, 501.

<sup>5</sup> *Taussig v. Hart*, 58 N. Y. 425; *Tewksbury v. Spruance*, 75 Ill. 187; *Stewart v. Mather*, 32 Wis. 344; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Mollett v. Robinson*, L. R. 5 C. P. 655; *Ruckman v. Bergholz*, 38 N. J. L. 531; *Hughes v. Washington*, 72 Ill. 84; *Conkey v. Bond*, 34 Barb. 276; *Rodliffe v. Dallinger*, 141 Mass. 1; *Martin v. Moulton*, 8 N. H. 504. The broker's clerk is under the same prohibition. *Gardner v. Ogden*, 22 N. Y. 327. But this restriction does not apply where the broker's sale or purchase is made with the full knowledge and consent of the principal. *Edwards v. Goldsmith*, 16 Pa. St. 43; *Keys v. Johason*, 68 Pa. St. 42; *Reed v. Reed*, 32 Pa. St. 420; *Stewart v. Mather*, 32 Wis. 344; *Grant v. Hardy*, 33 Wis. 668. But see *Tower v. O'Neill*, 66 Pa. St. 332.

on the contract.<sup>1</sup> But for no other purpose could the broker act for both parties, since their interests are antagonistic.<sup>2</sup>

§ 273. **The powers of the factor or commission merchant.** — The power of the factor or commission merchant, like that of the broker, depends for its scope chiefly upon the usage of the business world; and where a particular power is sanctioned by usage, he can bind his principal in the exercise of it, although the principal may be ignorant of the usage.<sup>3</sup> The factor has the power to do whatever is usual and necessary to effect the sale.<sup>4</sup>

Like the broker, if the usage of trade justifies it, the factor or commission merchant may warrant the quality of the goods<sup>5</sup> and sell on credit; and if he exercises reason-

<sup>1</sup> *Henderson v. Barnewell*, 1 Y. & Jerv. 387; *Fairbrother v. Simmons*, 5 B. & Ald. 338; *Hinckley v. Arey*, 27 Me. 362; *Coddington v. Goddard*, 16 Gray, 436; *Everheart v. Searle*, 71 Pa. St. 256; *Grant v. Hardy*, 33 Wis. 668; *Cassard v. Human*, 6 Bosw. 8; *Pagsley v. Murray*, 4 E. D. Smith, 245; *Woods v. Rocchi*, 32 La. Ann. 210; *Schlesinger v. Texas, &c.*, R. R. Co., 13 Mo. App. 471; *Evans v. Waln*, 71 Pa. St. 256; *Raisin v. Clark*, 41 Md. 158; *Greaves v. Legg*, 2 Hur. & N. 210; *Wright v. Danah*, 2 Camp. 203. See *ante*, § 79, as to bought and sold notes.

<sup>2</sup> *Meyer v. Hanchett*, 39 Wis. 419; *Stainback v. Read*, 11 Gratt. 281; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pugsley v. Murray*, 4 E. D. Smith, 245.

<sup>3</sup> *Johnson v. Osborne*, 11 Ad. & El. 549; *Coles v. Bristowe*, 17 W. R. 105; *Cotton v. Hiller*, 52 Miss. 7; *Phillips v. Moir*, 69 Ill. 155; *Kauffman v. Beasley*, 54 Tex. 563; *Dwight v. Whitney*, 15 Pick. 179; *Frank v. Jenkins*, 22 Ohio St. 597; *Roosevelt v. Doherty*, 129 Mass. 303; *Goodenow v. Tyler*, 7 Mass. 36; *Bailey v. Bensley*, 87 Ill. 556; *Lyon v. Culbertson*, 83 Ill. 33; *Hatcher v. Comer*, 73 Ga. 418; *Randall v. Kehler*, 60 Me. 37; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Jackson Ins. Co. v. Partee*, 9 Heisk. 296; *Maxted v. Paine*, L. R. 4 Ex. 81.

<sup>4</sup> *Bayliffe v. Butterworth*, 1 Exch. 425; *Randall v. Kehler*, 60 Me. 37; *Smith v. Tracy*, 86 N. Y. 79; *Van Alen v. Vanderpool*, 6 Johns. 70; *Palmer v. Hatch*, 46 Mo. 585; *Andrews v. Kneeland*, 6 Cow. 354; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Schuchardt v. Allens*, 1 Wall. 359.

<sup>5</sup> *Schuchardt v. Allen*, 1 Wall. 359; *Bradford v. Bush*, 10 Ala. 386; *Palmer v. Hatch*, 46 Mo. 585; *Randall v. Kehler*, 60 Me. 37; *Smith v.*



able care in the bestowal of credit, he will not be liable to the principal in case of loss, unless he is selling under a *del credere* commission.<sup>1</sup> By a *del credere* commission is meant that the factor or commission merchant guarantees the credits he gives, and receives therefor an additional percentage of commission.<sup>2</sup>

Inasmuch as he has the possession of the goods, the factor is authorized to make sales of them in his own name, the rights of the principal being in no wise affected thereby.<sup>3</sup> And whether the sale is made in the name of the principal or of the factor, the latter not only has the right to receive payment of the price, but he also has the power to sue for it in his own name, the principal having the same right in either case.<sup>4</sup> But if the sale were made in

Tracy, 36 N. Y. 79; Nelson v. Cowing, 6 Hill, 386; Upton v. Suffolk Co. Mills, 11 Cush. 586; Woodford v. McClenahan, 9 Ill. 85; Hunter v. Jameson, 6 Ired. L. 252; Skinner v. Gunn, 9 Port. (Ala.) 805.

<sup>1</sup> Marshall v. Williams, 2 Biss. 255; Forrestler v. Boardman, 1 Story, 43; Burrill v. Phillips, 1 Gall. 360; Ernest v. Stoller, 5 Dill. 438; May v. Mitchell, 5 Humph. 365; Laussatt v. Lippincott, 6 Serg. & R. 386; Byrne v. Schwing, 6 B. Mon. 199; Clark v. Van Northwick, 1 Pick. 343; Roosevelt v. Doherty, 129 Mass. 301; Hapgood v. Batcheller, 4 Met. 576; Goodenow v. Tyler, 7 Mass. 36; Pinckham v. Crocker, 77 Me. 563; Greeley v. Bartlett, 1 Greenl. 172; James v. McCredie, 1 Bay, 294; Daylight Burner v. Odlin, 51 N. H. 56; McConnico v. Curzer, 2 Call, 358; Winne v. Hammond, 87 Ill. 99; Parker v. Fergus, 43 Ill. 437; Burton v. Goodspeed, 69 Ill. 237; Foster v. Waller, 75 Ill. 464; Chandler v. Hoyle, 58 Ill. 46; Rich v. Monroe, 14 Barb. 602; Leland v. Douglass, 1 Wend. 490; Robertson v. Livingston, 5 Cow. 478; Van Alen v. Vanderpool, 6 Johns. 69; Leverick v. Melgs, 1 Cow. 645.

<sup>2</sup> Conturier v. Hastie, 16 Eng. L. & Eq. 562; 5 Exch. 40; Swan v. Nesmith, 7 Pick. 220; Bradley v. Richardson, 23 Vt. 720; Cartwright v. Green, 47 Barb. 9; Sherwood v. Stone, 14 N. Y. 268; Thompson v. Perkins, 3 Mas. (U. S.) 232; Lewis v. Brehme, 33 Md. 412; Wolf v. Koppell, 5 Hill, 458; Leverick v. Melgs, 1 Cow. 645; Dalton v. Goddard, 104 Mass. 497; Grover v. Dubois, 1 T. R. 112.

<sup>3</sup> Bood v. Palmer, 11 Me. 414; Graham v. Duckwall, 8 Bush, 12; Slack v. Tucker, 23 Wall. 321.

<sup>4</sup> Girard v. Taggard, 5 Serg. & R. 19; Earle v. De Witt, 6 Allen, 520; Lerner v. Johns, 9 Allen, 419; Toland v. Murray, 18 Johns. 24; Ladd v. Arkell, 87 N. Y. Sup. Ct. 35; White v. Chouteau, 10 Barb. 202; Hogan

the factor's name, the purchaser has a right to treat the factor as the principal, and he does not lose the equities and defenses, which he could enforce against the factor, by the suit being brought in the name of the real principal.<sup>1</sup>

It is hardly necessary to add, that payment of the price to either the principal or his factor precludes any recovery by the other party.<sup>2</sup>

The factor has no implied power either to barter or to pledge the goods entrusted to his care, and the pledgee, in the absence of a statute to the contrary,<sup>3</sup> acquires no title to the goods as against the principal.<sup>4</sup>

*v. Shorb*, 24 Wend. 458; *Burton v. Goodspeed*, 69 Ill. 237; *Sadler v. Leigh*, 4 Camp. 194; *Drinkwater v. Goodwin*, Cowp. 251; *Leach v. Bush*, 57 Ala. 145; *Graham v. Duckwall*, 8 Bush, 12; *Taintor v. Prendergast*, 3 Hill, 72; *Leverick v. Meigs*, 1 Cow. 645; *Grinnell v. Schmidt*, 2 Sandf. 706; *Roosevelt v. Doherty*, 129 Mass. 301; *Barry v. Paige*, 10 Gray, 398; *Ilsley v. Merriam*, 7 Cush. 242.

<sup>1</sup> *Roosevelt v. Doherty*, 129 Mass. 301; *Barry v. Page*, 10 Gray, 398; *Parker v. Donaldson*, 2 Watts & S. 9; *Gardner v. Allen*, 6 Ala. 187; *Locke v. Lewis*, 124 Mass. 1, 7; *Huntington v. Knox*, 7 Cush. 371. But it is different where the purchaser knew or had reason to believe, that the party with whom he dealt was acting as a commission merchant. *Miller v. Lea*, 35 Md. 396; *Stewart v. Woodward*, 50 Vt. 78; *Ladd v. Arkell*, 40 N. Y. Sup. Ct. 150. Nor can he claim the right of set-off against real principals if he had no reasonable grounds for the impression that the factor was the principal. *Brown v. Morris*, 83 N. C. 251.

<sup>2</sup> *Golden v. Levy*, 1 Car. L. Repos. 527; *Kelley v. Munson*, 7 Mass. 319.

<sup>3</sup> See *post*, chapter on *Bona Fide Purchasers*.

<sup>4</sup> *Gray v. Agnew*, 95 Ill. 315; *Bowie v. Napier*, 1 McCord, 1; *Victor S. M. Co. v. Heller*, 44 Wis. 265; *Kauffman v. Beasley*, 54 Tex. 563; *Rodriguez v. Hefferman*, 5 Johns. Ch. 417; *Urquhart v. McIver*, 4 Johns. 108; *Odiorne v. Maxey*, 13 Mass. 178; *Nowell v. Pratt*, 5 Cush. 111; *Florence Sew. M. Co. v. Warford*, 1 Sweeney, 433; *Laussatt v. Lippincott*, 6 Serg. & R. 391; *Hayes v. Campbell*, 55 Cal. 421; *Horr v. Barker*, 11 Cal. 393; *Chicago Taylor, &c., Co. v. Lowell*, 60 Cal. 454; *Voss v. Robertson*, 46 Ala. 483; *Steiger v. Third Nat. Bank*, 2 McCrary, 494; *Kelley v. Smith*, 1 Blatchf. 290; *Warner v. Martin*, 11 How. 209; *Evans v. Potter*, 2 Gall. 12; *Mechanics', &c., Ins. Co. v. Kiger*, 103 U. S. 352; *Merchants' Nat. Bank v. Trenholm*, 12 Helsk. 520; *Bott v. McCoy*, 20 Ala. 578; *Hutchinson v. Bours*, 6 Cal. 383; *Wright v. Solomon*, 19 Cal. 64; *Newbold v. Wright*, 4 Rawle, 195; *Mackey v. Dillinger*, 73 Pa. St. 85;

§ 274. Sales by pledgees. — A pledge is a transfer of personal property to secure the payment of a debt, and as an incident of the pledge, the pledgee has the power, without any legal process, to sell the goods on default in the payment of the debt.<sup>1</sup> But in order that he may pass to his purchaser a better title than that of assignee of the pledge, the pledgor must be given due notice of the time and place of sale. In the absence of statutory regulations, the sufficiency of the notice is determined on general principles.<sup>2</sup> But actual knowledge of these things on the part of the pledgor, it matters not from what source the information may have come, will dispense with the requirement of notice from the pledgee.<sup>3</sup> It is doubtful whether notice to the pledgor by publication is sufficient,<sup>4</sup> and it would be advisable, if not always necessary, to make the notice as personal in character as the circumstances will allow; and if personal notice cannot be given, by reason of the absence of the pledgor in parts unknown, it is better to foreclose the pledgor's equity of redemption by a bill in chancery.<sup>5</sup>

*Michigan State Bank v. Gardner*, 15 Mass. 362; *Kinder v. Shaw*, 2 Mass. 398; *Bonito v. Mosquera*, 2 Bosw. 401; *Walth er v. Wetmore*, 1 E. D. Smith, 7; *Kennedy v. Strong*, 14 Johns. 128; *McCreary v. Gaines*, 55 Tex. 485; *First Nat. Bank v. Nelson*, 38 Ga. 391; *Wheeler, &c., Mfg. Co. v. Givan*, 65 Mo. 99.

<sup>1</sup> *Tucker v. Wilson*, 1 P. Wms. 261; *Martin v. Read*, 11 C. B. (N. S.) 730; *Pigot v. Cubley*, 15 C. B. (N. S.) 701; *Johnston v. Stear*, 15 C. B. (N. S.) 330; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Lockwood v. Ewer*, 9 Mod. 278; *Stearns v. Marsh*, 4 Denio, 227; *Wheeler v. Newbold*, 16 N. Y. 392; *Washburn v. Pond*, 2 Allen, 474;

<sup>2</sup> *Bryan v. Baldwin*, 52 N. Y. 233; *Cushman v. Hayes*, 46 Ill. 145; *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Washburn v. Pond*, 2 Allen, 474; *Gay v. Moss*, 34 Cal. 125; *Goldsmith v. Church Trustees*, 6 Rep. 435; *Millikin v. Dehon*, 10 Bosw. 325; *Stearns v. March*, 4 Denio, 227; *Conyngham's Appeal*, 57 Pa. St. 474; *Davis v. Funk*, 39 Pa. St. 243.

<sup>3</sup> *Alexandria R. R. Co. v. Burke*, 22 Gratt. 254.

<sup>4</sup> *Contra*, *Potter v. Thompson*, 10 R. I. 1; *pro.*, *Stokes v. Frazier*, 72 Ill. 428. See *City Bank of Racine v. Babcock*, 1 Holmes C. C. 180.

<sup>5</sup> See *Stearns v. Marsh*, 4 Denio, 227; *Pigot v. Cubley*, 15 C. B. (N. S.) 701; *Donohoe v. Gamble*, 38 Cal. 340.

The pledgee cannot make an absolute sale until there has been a default by the pledgor. Hence if a demand of payment is required before the payor can be guilty of default, demand of payment must in those cases precede the advertisement and sale of the pledge.<sup>1</sup> But, generally, demand is not necessary.<sup>2</sup>

The pledgee must sell at public auction,<sup>3</sup> and in a fair and impartial manner.<sup>4</sup> But mere inadequacy in the price will not affect the character of the sale,<sup>5</sup> and certainly not the title of a *bona fide* purchaser.<sup>6</sup>

Like all other agents for sale, the pledgee cannot buy at his own sale, either directly or indirectly through his agent. This sale may be avoided or enforced by the pledgor, at his option.<sup>7</sup>

Sales by pledgees are now regulated more or less by statutes, particularly sales by pawnbrokers; and since these statutory regulations are not uniform in character, the reader must be referred to the statutes themselves for further information.

<sup>1</sup> *Pigot v. Cubley*, 15 C. B. (N. S.) 701; *Wadsworth v. Thompson*, 8 Ill. 423; *Stokes v. Frazier*, 72 Ill. 428; *Wilson v. Little*, 2 Comst. 443.

<sup>2</sup> *Martin v. Reed*, 11 C. B. (N. S.) 730.

<sup>3</sup> *Wheeler v. Newbould*, 16 N. Y. 392; *Washburn v. Pond*, 2 Allen, 474; *Strong v. Nat. Bank Assn.*, 45 N. Y. 718. A sale at brokers' board is private and hence invalid as a foreclosure of the pledgor's rights. *Dykens v. Allen*, 7 Hill, 497; *Wheeler v. Newbould*, *supra*; *Markham v. Jandon*, 41 N. Y. 235. But see *Md. Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Child v. Hugg*, 41 Cal. 519.

<sup>4</sup> *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Ainsworth v. Bowen*, 9 Wis. 348.

<sup>5</sup> *Ainsworth v. Bowen*, 9 Wis. 348.

<sup>6</sup> *Lewis v. Mott*, 36 N. Y. 395; *Newport Bridge Co. v. Douglass*, 12 Bush, 673; *Potter v. Thompson*, 10 R. I. 1; *Stokes v. Frazier*, 72 Ill. 428.

<sup>7</sup> *Pigot v. Cubley*, 15 C. B. (N. S.) 702; *Ogden v. Lathrop*, 65 N. Y. 158; *Bryan v. Baldwin*, 52 N. Y. 233; *Stokes v. Frazier*, 72 Ill. 428; *Balt. M. Ins. Co. v. Dalrymple*, 25 Md. 269; *Hestonville R. R. Co. v. Shields*, 2 Brewst. 257; *Bank of Old Dominion v. Dubuque R. R. Co.*, 8 Iowa, 277; *Ainsworth v. Bowen*, 9 Wis. 348; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Middlesex Bank v. Minot*, 4 Met. 25; *Hope v. Lawrence*, 1 Hun, 317; *Hamilton v. State Bank*, 122 Iowa, 306.

§ 275. **Sales by master of vessel.**—The master of a vessel has the power, when in distress and away from the home port, to sell the ship and cargo, and so far as the necessities of the case require the sale, the purchaser will get a good title against the owners.<sup>1</sup> But inasmuch as admiralty and shipping constitute a distinct and separate branch of our jurisprudence, it is not considered necessary or advisable to enter into a full-discussion of this subject.

§ 276. **Sales by trustees.**—The subject of sales by trustees depends to such an extent on the general doctrine of trusts for elucidation that it is not considered to be possible to present it intelligently without an extensive discussion of the law of trusts. It is better to leave the discussion to writers upon that special topic, and to be content in the present instance with the statement that the trustee, in exercising the power of sale, must exercise reasonable discretion, and must act always for the best interests of his *cestui que trusts*.

§ 277. **Sales by executors and administrators.**—The executor or administrator, as the personal representative of the deceased owner, and as a trustee for the creditors of the estate and the next of kin, acquires by the common law absolute control over and unrestricted power to sell all kinds of personal property of the deceased owner.<sup>2</sup> This

<sup>1</sup> *The Gratitude*, 3 Rob. Adm. 259; *Vlierboom v. Chapman*, 13 M. & W. 239; *Cannan v. Meaburn*, 1 Bing. 243; *Cammell v. Sewell*, 3 H. & N. 617; *Australasian, &c., Co. v. Morse*, L. R. 4 P. C. 222; *Atlantic Ins. Co. v. Huth*, 16 Ch. D. 474, 481 C. A.; *The Amelle*, 6 Wall. 26; *The Ship Packet*, 3 Mason, 255; *The Sarah Ann*, 2 Sumn. 215; *Howland v. India Ins. Co.*, 131 Mass. 255; *Gates v. Thompson*, 57 Me. 442; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Meyers v. Baymore*, 10 Pa. St. 114; *Pope v. Nickerson*, 3 Story, 466; *Post v. Jones*, 19 How. 150; *Ocatos v. Burns*, 3 Ex. D. 289, C. A.; *Tronson v. Dent*, 8 Moo. P. C. 419; *Underwood v. Robertson*, 4 Camp. 138; *Freeman v. East India Company*, 5 B. & A. 621.

<sup>2</sup> *Hertell v. Bogert*, 9 Paige, 57; *Field v. Schieffelin*, 7 John. Ch. 155; *Hunter v. Lawrence*, 11 Gratt. 111; *Mead v. Byington*, 10 Vt. 116; *Clark*

power of disposition, in order to perform his duties to the creditors, extends even to chattels which have been specifically bequeathed.<sup>1</sup> The personal representative has this power at common law; but in many of the States, authority is given to the courts to assume control of the sales of executors and administrators, and when such statutes prevail, these officers are obliged to obey the instructions of the court as to the form and manner of sale; and in the absence of judicial orders, they are required by the statute to sell at public auction.<sup>2</sup> It is thus held, under the Wisconsin statute, that the executor or administrator cannot without an order of the court sell for a price below the appraised value.<sup>3</sup> The provisions of the statutes, of course, vary in detail, and it will be impossible to present here a full account of them, the reader being expected to look to the statutes of his own state for guidance.<sup>4</sup> The general power of the

*v. Blackington*, 110 Mass. 369, 375; *Harnrick v. Craven*, 39 Ind. 241; *Bradshaw v. Simpson*, 6 Ired. Eq. 243; *Gray v. Armistead*, 6 Ired. Eq. 74; *Nelson v. Stollenwerck*, 60 Ala. 140; *Wharton v. Moragne*, 62 Ala. 201; *Mead v. Ouray*, 3 Atk. 289; *McLeod v. Drummond*, 17 Ves. 154; *Shaw v. Spencer*, 100 Mass. 382; *Smith v. Ayer*, 101 U. S. 320; *Goodwin v. Am. Bank*, 48 Conn. 550; *Wood's Appeal*, 92 Pa. St. 379; *Carter v. Manufacturer's Bank*, 71 Me. 448; *Vane v. Rigdon*, L. R. 5 Ch. 663; *Scott v. Tyler*, 2 Dick. 720; *Marshall County v. Hanna*, 57 Iowa, 372; *Hough v. Bailey*, 82 Conn. 288; *Makepiece v. Moore*, 10 Ill. 474; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559; *Yerga v. Jones*, 16 How. 87; *Bond v. Ziegler*, *Raynor v. Pearsall*, 8 John. Ch. 578.

<sup>1</sup> *Ewer v. Corbet*, 2 P. Wms. 149; *Burting v. Stonard*, 2 P. Wms. 160; *Garnett v. Macon*, 6 Call, 308; *McMullen v. O'Reilly*, 15 Ir. Ch. 251; *Hertell v. Bogert*, 9 Paige, 52.

<sup>2</sup> Such statutes are to be found in New York, Massachusetts, Wisconsin, Minnesota and other States. See *Fambo v. Gnatt*, 12 Ala. 265; *Joslin v. Gaughlin*, 26 Miss. 184; *Bond v. Ziegler*, 1 Kelly, 324; *McArthur v. Caine*, 32 Ala. 75; *Gaines v. De la Croix*, 6 Wall. 719; *In re Sanderson (Cal.)*, 13 Pac. Rep. 497; *Butler v. Butler*, 10 R. I. 501; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Bogan v. Camp*, 30 Ala. 276; *Saxon v. Barksdale*, 4 Desaus. 526; *Baines v. McGee*, 1 Smed. & M. 208.

<sup>3</sup> *Monteith v. Rahn*, 14 Wis. 210.

<sup>4</sup> See *French v. Currier*, 47 N. H. 88; *Tell City Furniture Co. v. Stiles*, 60 Miss. 849; *McCook v. Pond*, 72 Ga. 160; *Wells v. Wells*, 30 La. An.,

executor, where it is restricted by statute, may be enlarged by an express power of sale, given in the will.<sup>1</sup>

In the absence of fraud or collusion, and where the sale is made in good faith and for a valuable and substantial consideration, the purchaser gets a good title, which cannot be attacked by any one interested in the property as next-of-kin, creditors or legatee.<sup>2</sup> And this seems to be the case, even where the sale is made by the personal representative in violation of judicial, statutory or testamentary instructions.<sup>3</sup> Nor is the purchaser obliged to see that the personal representative applies the proceeds of sale to the purpose for which he was authorized to make the sale,<sup>4</sup> ex-

pt. II, 935; *Hall v. Chapman*, 35 Ala. 558; *Crawford v. Blackburn*, 19 Md. 40; *Halleck v. Moss*, 17 Cal. 339; *Butler v. Butler*, 10 R. I. 501; *Beene v. Collenberger*, 38 Ala. 647; *Succession of Michel*, 20 La. An. 238; *Jacob's Appeal*, 23 Pa. St. 477; *Martin v. McConnell*, 29 Ga. 205; *Robbins v. Wolcott*, 27 Conn. 284.

<sup>1</sup> *Durham's Estate*, 49 Cal. 491; *Dugan v. Hollins*, 11 Md. 41; *Smith v. Taylor*, 21 Ill. 296. It is doubtful whether a testator may by a provision in the will, restrain the executor's power of sale so as to prevent the passing of title to purchaser. See, apparently to the contrary, *Evans v. Evans' Exrs*, 1 Desaus. 515, 520; *Tyrrell v. Morris*, 1 N. C. 559; *Richardson v. Knight*, 69 Me. 285.

<sup>2</sup> *Whale v. Booth*, 4 T. R. 625; *Jones v. Clark*, 25 Gratt. 642; *Lothrop v. Wightman*, 41 Pa. St. 297; *Leitch v. Wells*, 48 N. Y. 585; *Overfield v. Bullitt*, 1 Mo. 749; *Hough v. Bailey*, 32 Conn. 288; *Walker v. Craig*, 18 Ill. 116; *Makepeace v. Moore*, 10 Ill. 474; *Speelman v. Culbertson*, 15 Ind. 441; *Thomas v. Reuster*, 8 Ind. 369; *Wilson v. Doster*, 7 Ired. Eq. 231; *Polk v. Robinson*, 7 Ired. Eq. 235; *Griswold v. Chandler*, 5 N. H. 492.

<sup>3</sup> *Hadley v. Kendrick*, 10 Lea, 525; *Smith v. Ayer*, 101 U. S. 320, 327; *Duncan v. Jandon*, 15 Wall. 165; *Bayard v. Farmers' Bank*, 52 Pa. St. 232; See also *Price v. Nesbit*, 1 Hill (S. C.) Ch. 445; *Harth v. Heddlstone*, 2 Day, 321; *Sherman v. Willett*, 42 N. Y. 146; *Pullman v. Byrd*, 2 Strobb. Eq. 134; *Knight v. Yarborough*, 4 Rand. 566; *Mead v. Byington*, 10 Vt. 116. But see *Robbins v. Wolcott*, 27 Conn. 284; *Joslin v. Coughlin*, 30 Miss. 502.

<sup>4</sup> *Macleod v. Drummond*, 17 Ves. 154; *Scott v. Tyler*, 2 Dick. 725; *Ashton v. Atlantic Bank*, 8 Allen, 217; *Shaw v. Spencer*, 100 Mass. 382; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Smith v. Ayer*, 101 U. S. 320; *Crelghton v. Pringle*, 3 S. C. 77; *Hertell v. Bogart*, 9 Paige, 52; *Hutchin*

cept always, when the purchaser participates in the fraudulent design either without any benefit to himself,<sup>1</sup> or with benefit to himself, where he buys at a grossly inadequate price,<sup>2</sup> or takes the property in settlement of the representative's debt to him.<sup>3</sup>

Executors and administrators are liable to the estate if

*v. State Bank*, 12 Met. 421. See, also, *Cadbury v. Duval*, 10 Pa. St. 265, 267; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Hauser v. Shore*, 5 Ired. Eq. 357; *Wormley v. Wormley*, 8 Wheat. 442; *Gardner v. Gardner*, 3 Mason, 178; *Andrews v. Sparhawk*, 13 Pick. 393.

<sup>1</sup> *Dodson v. Simpson*, 2 Rand. 294; *Ashton v. Atlantic Bank*, 3 Allen, 217; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559; *Shaw v. Spencer*, 100 Mass. 382; *Sherburne v. Godwin*, 44 N. H. 271, 279. But the transaction is held to be collusive on the part of the purchaser, if he with the foreknowledge that the personal representative intends to make use of the proceeds for an unlawful purpose. *Petrie v. Clark*, 11 Serg. & R. 377; *Colt v. Lesnier*, 9 Cow. 320; *Wilson v. Doster*, 7 Ired. Eq. 281; *Acheson v. Scott*, 51 Tex. 213; *Rogers v. Zook*, 86 Ind. 287; *Parker v. Gilliam*, 10 Yerg. 394; *Salmon v. Clagett*, 3 Bland, 125. See, also, *Garrard v. R. Co.*, 29 Pa. St. 154; *McNair's Appeal*, 4 Rawle, 155; *Baines v. McGee*, 1 Smed. & M. 208; *Swink v. Snodgrass*, 17 Ala. 653; *Williamson v. Branch Bank*, 7 Ala. 906; *Johnson v. Johnson*, 2 Hill Ch. 277; *Saxon v. Barksdale*, 4 Desau. 526; *Williamson v. Morton*, 2 Md. Ch. 94; *Graff v. Castleman*, 5 Rand. 195; *Dodson v. Simpson*, 2 Rand. 294; *Garnett v. Macon*, 6 Call, 308; *Sacla v. Berthoud*, 17 Barb. 15; *Field v. Schieffelin*, 7 John. Ch. 260.

<sup>2</sup> *Scott v. Tyler*, 2 Dick. 725; *Joyner v. Conger*, 6 Jones Eq. 78; *McMullen v. O'Reilly*, 15 Ir. Ch. 251; *Skrine v. Simmons*, 11 Ga. 401; *Heath v. Allen*, 1 A. K. Marsh. 442; *Rice v. Gordon*, 11 Beav. 265.

<sup>3</sup> *Bonney v. Rldgard*, 1 Cox, 145; *Andrew v. Wrigley*, 4 Bro. C. C. 136; *Keane v. Roberts*, 4 Madd. 357; *Cubbridge v. Bradwright*, 1 Russ. Ch. 549; *Eland v. Eland*, 4 Myl. & Cr. 427; *Cole v. Muddle*, 10 Hare, 186; *Miller v. Helm*, 2 Smed. & M. 687; *Carter v. Manufacturers' Bank*, 71 Me. 448; *Smart v. Waterhouse*, 6 Humph. 158; *Jandon v. Nat. Bank*, 8 Blatchf. 480; *Field v. Schieffelin*, 7 Johns. Ch. 250; *Miller v. Williamson*, 5 Md. 219; *Austin v. Wilson*, 21 Ind. 252; *Dodson v. Simpson*, 2 Rand. 294; *Gray v. Armistead*, 6 Ired. Eq. 74; *Petrie v. Clark*, 11 Serg. & R. 377; *Shaw v. Spencer*, 100 Mass. 382; *Bradshaw v. Simpson*, 6 Ired. Eq. 243; *Graff v. Castleman*, 5 Rand. 195; *Williamson v. Branch Bank*, 7 Ala. 906; *Pendleton v. Fay*, 2 Paige, 202; *Wilson v. Doster*, 7 Ired. Eq. 281; *Duncan v. Jandon*, 15 Wall. 142; *Green v. Sargeant*, 23 Vt. 466; *Scott v. Searles*, 15 Miss. 498; *Sherburne v. Goodwin*, 44 N. H. 271.



they sell for an inadequate price,<sup>1</sup> or on credit, without taking sufficient security.<sup>2</sup>

Like all other agents, the executor or administrator is not permitted to buy at his own sale, directly or indirectly; but such a purchase is not absolutely void, only voidable at the option of those who are interested in the estate.<sup>3</sup>

There is no implied warranty of title in sales by executors and administrators,<sup>4</sup> and if the personal representative should give an express warranty of title or quality, the warranty would bind the representative and not the estate.<sup>5</sup> But in the absence of an express warranty, the personal representative is not liable for any failure in quality or title, unless he can be charged with some fraudulent mis-

<sup>1</sup> *Matter of Saltus*, 8 Abb. App. 243.

<sup>2</sup> *Bower v. Shay*, 105 Ill. 132. But see *Sparrow v. Kelso*, 92 Ind. 514.

<sup>3</sup> *Chaffe v. Farmer*, 84 La. An. 1017; *Blount v. Davis*, 2 Dev. 19; *Lyon v. Lyon*, 8 Ired. 24; *Williams v. Marshall*, 4 Gill & J. 376; *Grubbs v. McGlawn*, 39 Ga. 672; *Anderson v. Green*, 46 Ga. 361; *Boyd v. Blankman*, 29 Cal. 19; *Shine v. Redwin*, 30 Ga. 780; *Moore v. Hilton*, 12 Leigh, 1; *Musselman v. Eshleman*, 10 Pa. St. 401; *Torrey v. Bank of Orleans*, 9 Falge, 649; *Green v. Sargeant*, 23 Vt. 466; *Mead v. Byington*, 10 Vt. 116; *Flanders v. Flanders*, 23 Ga. 249; *Mercer v. Newson*, 23 Ga. 151; *Gilbert's Appeal*, 78 Pa. St. 266; *Lytle v. Beveridge*, 58 N. Y. 593; *Boraem v. Wells*, 19 N. J. Eq. 87; *Davone v. Fanning*, 2 Johns. Ch. 253; *Ives v. Ashley*, 97 Mass. 198; *Harrington v. Brown*, 5 Pick. 519; *Jennison v. Hapgood*, 7 Pick. 1, 8; *Skillman v. Skillman*, 15 N. J. Eq. 338; *Coat v. Coat*, 63 Ill. 73; *Breckenridge v. Holland*, 2 Blackf. 377; *Marshall v. Carson*, 38 N. J. Eq. 250; *Prindle v. Beveridge*, 7 Lans. 225; *Newton v. Roe*, 33 Ga. 163; *Frazer v. Lee*, 42 Ala. 25; *Glass v. Greathouse*, 20 Ohio, 503; *McGowan v. McGowan*, 48 Miss. 553; *Culverhouse v. Shirey*, 42 Ark. 25; *Rafferty v. Mallory*, 3 Biss. 362; *Froneberger v. Lewis*, 70 N. C. 456.

<sup>4</sup> *Chapman v. Speller*, 14 Q. B. 621; *Bartholomew v. Warner*, 32 Conn. 98; *Bingham v. Maxey*, 15 Ill. 295; *Blood v. French*, 9 Gray, 197. The purchaser takes the title at his own risk, and cannot refuse to pay the price if the title should prove defective. *Cogan v. Frisby*, 36 Miss. 178; *Succession of White*, 9 La. Ann. 232; *Stanbrough v. Evans*, 2 La. An. 474. But see *Mockbee v. Gardner*, 2 Har. & G. 176, 177.

<sup>5</sup> *Mockbee v. Gardner*, 2 Har. & G. 176, 177; *Buckels v. Cunningham*, 14 Miss. 358; *Lynch v. Baxter*, 4 Tex. 431; *Ramsey v. Blalock*, 34 Ga. 376; *Sumner v. Williams*, 8 Mass. 162. But see, *contra*, *Craddock v. Stewart*, 6 Ala. 77, 80.

representation, whereby the purchaser had been misled.<sup>1</sup> And where the sale has been procured by fraud, it is a good defense in any action against the purchaser by or in the name of the estate;<sup>2</sup> while the personal representative is, at the same time, liable in damages for the fraud.<sup>3</sup>

The general rule is that the executor or administrator cannot bind the estate by any purchase he may make, although it is for the benefit of the estate, and he is himself liable on such contracts.<sup>4</sup> And if purchases have to be made in order to carry on work already begun, for example, the cultivation of a planted crop, the purchases must be paid for out of the income of the estate; they cannot be made a general charge upon the estate.<sup>5</sup> But if the executor or administrator has confined the liability on the purchase to the income of the estate, and expressly exempted himself from any personal liability, he only charges himself with the duty of applying the income to the liquidation of the debt.<sup>6</sup> Since it is the duty of the personal representative to find investments for all superfluous funds, belonging to the estate, he has the incidental power to buy securities and other property with these funds.<sup>7</sup> And so, likewise, can he buy in property at a foreclosure sale, in order to protect the interest of the estate in the mortgage.<sup>8</sup>

It is also the duty of the executor or administrator to

<sup>1</sup> *Mockbee v. Gardner*, 2 Har. & G. 176, 177.

<sup>2</sup> *Williamson v. Walker*, 24 Ga. 257; *Crayton v. Munger*, 9 Tex. 285; *Able v. Chandler*, 12 Tex. 88.

<sup>3</sup> *Able v. Chandler*, 12 Tex. 88; *Sumner v. Williams*, 8 Mass. 162; *Buckels v. Cunningham*, 14 Miss. 358; *Mockbee v. Gardner*, 2 Har. & G. 176. See *West v. Wright*, 98 Ind. 335.

<sup>4</sup> *Harding v. Evans*, 3 Port. (Ala.) 221; *Lovell v. Field*, 5 Vt. 218.

<sup>5</sup> *Hardee v. Cheatham*, 52 Miss. 41; *Cain v. Young*, 1 Utah, 361; *S. P. Ferry v. Laible*, 27 N. J. Eq. 146.

<sup>6</sup> *Nichols v. Jones*, 3 A. K. Marsh. 385; *Allen v. Graffins*, 8 Watts, 397.

<sup>7</sup> *Trull v. Trull*, 13 Allen, 407.

<sup>8</sup> *Dusing v. Nelson*, 7 Cal. 184.

make suitable provision for the decent burial of the deceased. But it is difficult to determine what amount he can expend in the appointments of the funeral. As against distributees and legatees, the general rule is that he will be allowed charges for funeral expenses which are suitable and reasonable to one occupying the social and financial position of the deceased. But as against creditors, in the event of the insolvency of the estate, a less liberal amount is allowed.<sup>1</sup>

§ 278. Sales by guardians.—From one standpoint, it would have been proper to treat in this connection of sales by guardians. But inasmuch as the guardian has charge of the property vested in a living person, his power to sell is more properly treated under the head of involuntary sales.<sup>2</sup>

<sup>1</sup> See *Flintham's Appeal*, 11 Serg. & R. 16; *McGlinsay's Appeal*, 14 Serg. & R. 64; *Yardley v. Arnold*, 1 C. & M. 484, 488; *Reeves v. Ward*, 2 Scott, 895; *Patterson v. Patterson*, 59 N. Y. 574; *Rappelyea v. Russell*, 1 Daly, 214; *Wood v. Vandeburgh*, 6 Paige, 277; *Faunce's Estate*, 75 Pa. St. 220; *Patterson's Estate*, 1 Watts & S. 292; *Jennison v. Hapgood*, 10 Pick. 77; *Brackett v. Tillotson*, 4 N. H. 208; *Metz' Appeal*, 11 Serg. & R. 204; *Angle's Appeal*, 76 Pa. St. 431. But see *Stagg v. Punter*, 3 Atk. 119; *Fairman's Appeal*, 30 Conn. 205, where the same liberal rule is held to apply whether the estate turns out to be insolvent or not.

<sup>2</sup> See *ante*, § 258.

## CHAPTER XIX.

### AUCTION SALES.

**SECTION 280.** Auction sale defined.

281. Auctioneer's license and bond.

282. Obligations of the auctioneer to the seller.

283. The powers of the auctioneer.

284. The conditions of the auction sale.

285. Competition must be fair — Manner of bidding.

286. Statute of frauds in respect to auction sales.

287. The auctioneer's compensation.

288. Auctioneer, when liable as vendor.

§ 280. **Auction sales defined.** — The auction sale is a competitive sale by public outcry, whereby the property is offered generally for sale at the highest price which the bidders are willing to offer for it. The two necessary elements are publicity and competition between bidders.<sup>1</sup> If either of the elements is absent, the sale cannot be called an auction. For example, if the sale is public, but the price is fixed, it is not an auction.<sup>2</sup> But although the auctioneer is ordinarily engaged in selling the goods of another, it does not change the character of the sale, if he should offer his own goods for sale.<sup>3</sup>

§ 281. **Auctioneer's license and bond.** — In England and in many of the United States, auctioneering is considered as a regular business, and the auctioneers as such are taxed and subjected to police regulations. The regulation

<sup>1</sup> *Crandall v. State*, 28 Ohio St. 480; *Goshen v. Kern*, 63 Ind. 478; *Jordan v. Smith*, 19 Pick. 287.

<sup>2</sup> *Crandall v. State*, 28 Ohio St. 479.

<sup>3</sup> *Goshen v. Kern*, 63 Ind. 468.

usually takes the form of a license tax, which the auctioneer is required to pay as a condition precedent to the right of plying his calling.<sup>1</sup> And, ordinarily the license confines his authority to carry on his business to some particular town or county, and even to some particular building or room.<sup>2</sup> But if an auction sale should be conducted by an auctioneer, who had no license, while he would be personally liable to the statutory penalty, the validity of the sale would be in nowise affected by his delinquency.<sup>3</sup>

The auctioneer is, also, often required to give bond for the faithful performance of his duties, not only to the State in the matter of paying his tax, but also to his customers, who might otherwise be damaged by his malfeasances.<sup>4</sup>

§ 282. **Obligations of the auctioneer to the seller.**— Until some bid is accepted and the sale is closed, the

<sup>1</sup> See *State v. Poulterer*, 16 Cal. 514; *State v. Conkling*, 19 Cal. 501; *Waterhouse v. Dorr*, 4 Me. 333; *Decorah v. Dunstan*, 38 Iowa, 96; *Oskaloosa v. Tallis*, 25 Iowa, 440; *State v. Rucker*, 24 Mo. 557; *Hunt v. Philadelphia*, 35 Pa. St. 277; *Wright v. Atlanta*, 54 Ga. 645; *Wiggins v. Chicago*, 68 Ill. 372; *Fretwell v. Troy*, 18 Kan. 271; *Deposit v. Pitts*, 18 Hun, 475; *Clark v. Cushman*, 5 Mass. 505; *Sewall v. Jones*, 9 Pick. 412; *Jordan v. Smith*, 19 Pick. 287; *Amite City v. Clemnntz*, 24 La. Ann. 27; *Florence v. Richardson*, 2 La. Ann. 663.

<sup>2</sup> See *Waterhouse v. Dorr*, 4 Greenl. 333; *Wood v. Com.*, 12 Serg. & R. 218; *Robinson v. Green*, 3 Met. 159.

<sup>3</sup> *Robinson v. Green*, 3 Met. 159; *Williston v. Morse*, 10 Met. 17; *Gunnaldson v. Nyhus*, 27 Minn. 440. See *Clark v. Cushman*, 5 Mass. 505; *Hosmer v. Sargent*, 8 Allen, 97; *Sewall v. Jones*, 9 Pick. 412.

<sup>4</sup> See *State v. Poulterer*, 16 Cal. 514; *State v. Girardey*, 34 La. An. 620; *Florence v. Richardson*, 2 La. Ann. 663; *Commissioners v. Holloway*, 3 Hawks, 234; *Daly v. Com.*, 75 Pa. St. 331; *Georgetown v. Baker*, 2 Cranch, 291; *Lea v. Yard*, 4 Dall. 95; *Dallas v. Chalover*, 3 Dall. 500; *Davis v. Com.*, 3 Watts, 297; *Charleston v. Patterson*, 2 Bailey, 165; *McMechen v. Baltimore*, 3 Har. & J. 534; *Charity Hospital v. Girardey*, 36 La. Ann. 605; *St. Louis Church v. Bonneval*, 13 La. Ann. 321. But any change in the liability of the auctioneer, as where his notes are accepted in lieu of the cash, will discharge his bondsmen. *Monton v. Noble*, 1 La. Ann. 192.

auctioneer is exclusively the agent of the seller;<sup>1</sup> and where the auction is conducted by the sheriff in execution of a judgment, the principal is the judgment debtor and not the creditor, so that the latter is not responsible for the sheriff's misrepresentations.<sup>2</sup> The auctioneer is bound to obey the instructions given to him by the seller, and he is liable in damages to the principal, if he should disobey these instructions,<sup>3</sup> or should be guilty of any negligence in the performance of his duties, either in the case of the property before the sale,<sup>4</sup> or in the conduct of the sale.<sup>5</sup> He is also liable for any negligence in collection and transmission of the price of the goods;<sup>6</sup> but in the absence of fraud or misappropriation he is not liable for interest on account of delay in transmission of the money due to the principal.<sup>7</sup> But the auctioneer is not obliged to turn over to the principal a sum of money, deposited by the buyer in contemplation of and for the purpose of effecting the completion of the sale, until the sale has been completed. For, until it is completed, the auctioneer holds this sum of money as a stakeholder for both parties.<sup>8</sup>

<sup>1</sup> *Williams v. Poor*, 3 Cranch C. C. 251.

<sup>2</sup> *Weldler v. Farmers' Bank*, 11 Serg. & R. 184; *McKnight v. Gordon*, 13 Rich. Eq. 222; *Stetson v. O'Sullivan*, 8 Allen, 321.

<sup>3</sup> *Warlow v. Harrison*, 29 L. J. Q. B. 14; *Steele v. Ellmaker*, 11 Serg. & R. 86; *Williams v. Evans*, L. R. 1 Q. B. 352; *Broughton v. Silloway*, 114 Mass. 71; *Williams v. Poor*, 3 Cranch C. C. 251; *Wolfe v. Luyster*, 1 Hall, 146. See *Bush v. Cole*, 28 N. Y. 261.

<sup>4</sup> *Davis v. Garrett*, 6 Bing. 716; *Massey v. Banner*, 1 J. & W. 241; *Maltby v. Christle*, 1 Esp. 840; *Powell v. Sadler*, Paley P. & A. 80; *Topham v. Braddick*, 1 Taunt. 572.

<sup>5</sup> *Hicks v. Minturn*, 19 Wend. 550; *Bodin v. McCloskey*, 11 La. Ann. 46; *Townsend v. Van Tassel*, 8 Daly, 261.

<sup>6</sup> *Crosskey v. Mills*, 1 C. M. & R. 298; *Tripp v. Barton*, 13 R. I. 180; *Gray v. Haig*, 20 Beav. 219, 239; *Andrew v. Robinson*, 3 Camp. 199; *Earl of Ferress v. Robins*, 2 C. M. & R. 152; *Williamson v. Baltimore*, 19 Md. 413; *Nelson v. Aldridge*, 2 Stark. 435; *Williams v. Millington*, 1 H. Bl. 81.

<sup>7</sup> *Rogers v. Boehm*, 2 Esp. 701; *Tamer v. Burkinshaw*, L. R. 2 Ch. 488.

<sup>8</sup> *Hardingham v. Allen*, 17 L. J. C. P. 198; *Murray v. Mann*, 2 Exch. 588. See *Ellison v. Kerr*, 86 Ill. 427.

§ 283. **The powers of the auctioneer.** — The general powers of the auctioneer may be enlarged or restricted by express instructions; but in the absence of such instructions, they are determined by custom and usage.

In the first place, the appointment of an auctioneer is personal in character; and if he is not expressly authorized to do so, he cannot delegate his discretionary powers to another,<sup>1</sup> although the ministerial acts of the crier may be entrusted to another, provided that the appointed auctioneer was present and in charge of the sale.<sup>2</sup>

The auctioneer has no implied authority to warrant the goods;<sup>3</sup> and if he warrants without express authority to do so, it is not good except as his personal warranty.<sup>4</sup>

Whether the auctioneer will have the power to bind the principal by his receipt of the payment of the price, depends upon the conditions of the sale. If the sale is made under the express condition that the sale will not be valid, unless the auctioneer shall receive a deposit in part payment, it seems that his implied authority to receive payment will be thereby excluded.<sup>5</sup> And he also has no authority to

<sup>1</sup> *Com. v. Harnden*, 18 Pick. 482; *Wolf v. Van Metie*, 27 Iowa, 348; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542; *Stone v. Stone*, 12 Mo. 400.

<sup>2</sup> *Poree v. Bonneval*, 6 La. Ann. 386; *Com. v. Harnden*, 19 Pick. 482.

<sup>3</sup> *Blood v. French*, 9 Gray, 197; *Worthy v. Johnson*, 8 Ga. 286; *Commissioner v. Thompson*, 4 McCord, 434; *Davis v. Murray*, 1 Mill. Const. 143; *Robinson v. Cooper*, 1 Hill, 286; *Stone v. Pointer*, 5 Munf. 287; *Dwight's Case*, 15 Abb. Pr. 259; *Parker v. Partlow*, 12 Rich. 679; *Payne v. Lecondeld*, 51 L. J. Q. B. 642; *Hill v. Balls*, 27 L. J. Exch. 45; *Isley v. Stewart*, 4 Dev. & B. 160; *Cameron v. Logan*, 8 Iowa, 434; *Thayer v. Sheriff*, 2 Bay, 169; *Davis v. Hunt*, 2 Bailey, 412; *Yates v. Bond*, 2 McCord, 382; *Bashore v. Whisler*, 3 Watts, 490; *The Monte Allegro*, 9 Wheat. 645. See *Stoney v. Shultz*, 1 Hill Ch. (S. C.) 465; *Com. v. Macon*, 2 Brev. 105; *Forsythe v. Ellis*, 4 J. J. Marsh. 298; *Com. v. Dickinson*, 5 B. Mon. 506; *Harrison v. Shanks*, 13 Bush, 620.

<sup>4</sup> *Dent v. McGrath*, 3 Bush, 174; *Schell v. Stephens*, 50 Mo. 375; *McGrew v. Forsythe*, 31 Iowa, 179; *Woodward v. Boston*, 115 Mass. 81.

<sup>5</sup> See *Sykes v. Giles*, 5 M. & W. 645; *Thompson v. Kelly*, 101 Mass. 291. But I would consider the correctness of this opinion as somewhat doubtful.

receive payment where he has not the possession of the goods,<sup>1</sup> or the conditions of the sale indicate an intention on the part of the principal to receive payment himself. But in the absence of conditions and restrictions to the contrary, if the auctioneer has possession of the goods which he sells, he has the implied authority to receive payment for them.<sup>2</sup> The principal is bound by all the acts and representations which the auctioneer is authorized by usage and custom to make, limited otherwise only by the express restrictions of the principal and that, too, only as to those who deal with the auctioneer with knowledge of the existence of express restrictions upon his authority.<sup>3</sup>

The auctioneer, like every other agent, cannot buy goods at his own sale; he cannot even sell the goods to a firm or company of which he is a member. And in such cases the sales are voidable at the instance of the principal.<sup>4</sup> It is held, however, that the auctioneer may bid himself for a third party.<sup>5</sup>

In an action brought against him by the principal for the amount of the sales, the auctioneer is estopped from disputing the title of the principal to the goods.<sup>6</sup>

<sup>1</sup> *Offley v. Clay*, 2 M. & G. 172.

<sup>2</sup> *Sykes v. Giles*, 5 M. & W. 645; *Broughton v. Silloway*, 114 Mass. 71; *Tripp v. Barton*, 13 R. I 180; *Taylor v. Wilson*, 11 Met. 44; *Capel v. Thornton*, 8 C. & P. 352.

<sup>3</sup> *Bottoms v. Mithvin*, 26 Ga. 481; *Requa v. Rea*, 2 Paige, 339; *Langdon v. Summers*, 10 Ohio St. 77; *Ives v. Tregent*, 29 Mich. 390; *Plitt v. Yalden*, 4 Burr. 2060; *Moore v. Mourgue*, Cowp. 480; *Russell v. Palmer*, 2 Wils. 325. But see *Coats v. Stewart*, 19 Johns. 298; *Davis v. Hunt*, ; *Bailey*, 412; *Phillips v. Behn*, 19 Ga. 298; *Davis v. Irwin*, 8 Ga. 1532; *Jones v. Thacker*, 61 Ga. 329.

<sup>4</sup> *Salomons v. Pender*, 34 L. J. Exch. 95; *Baskett v. Cafe*, 4 De G. & Sm. 388; *Brock v. Rice*, 27 Gratt. 812; *Swires v. Brotherline*, 41 Pa. St. 185; *Oliver v. Court*, Dan. 301. See *Brotherline v. Swires*, 46 Pa. St. 68; *Morse v. Royal*, 12 Ves. 355. But see *Railroad v. Marsh*, 1 C. & J. 406.

<sup>5</sup> *Scott v. Mann*, 36 Tex. 157. But see *Coles v. Trecothick*, 9 Ves. 284, 288; *Campbell v. Swan*, 48 Barb. 109.

<sup>6</sup> *Hutchinson v. Gordon*, 2 Har. 179; *Osgood v. Nichols*, 5 Gray, 420.



The authority of the auctioneer to represent the principal ceases with the conclusion of the sale and the delivery of the goods. The principal is not bound by any contract or agreement which the auctioneer might make afterwards, which in any way affects the terms or obligation of the sale.<sup>1</sup>

§ 284. **The conditions of the auction sale.** — The auction sale is almost always subjected to conditions express or implied, which the auctioneer must see performed before he parts with the property.<sup>2</sup> Ordinarily, these express conditions are imposed by the principal, and he may change them during the progress of the sale, subject, of course, to the necessity of giving due notice of the change to the bidders.<sup>3</sup> But it seems that the auctioneer has, in the absence of express conditions from the principal, authority to impose reasonable conditions for the purpose of preventing fraud and unfair competition.<sup>4</sup> But in order that the conditions may be enforced against the purchaser, they must have been advertised sufficiently by newspapers and posters around the auction room and the like, as well as by the verbal announcements of the auctioneer, in order to be able to charge the bidders with the knowledge of the conditions. If reasonable care has not been exercised in giving notice of the conditions, the purchaser will not be

<sup>1</sup> *Stewart v. Garvin*, 38 Mo. 103; *Bolnest v. Leigne*, 2 Rich. 464; *Smith v. Rice*, 1 Bailey, 648; *Bradford v. Bush*, 10 Ala. 386.

<sup>2</sup> *Langsdale v. Mills*, 32 Ind. 281; *Williamson v. Berry*, 8 How. 495; *Singleton v. Herriott*, Dudley, 254; *McCall v. Elliott*, Dudley, 250; *Moore v. Owsley*, 37 Tex. 603; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Welch v. Louis*, 31 Ill. 446.

<sup>3</sup> *Morrison v. Morrison*, 6 Watts & S. 518; *Grantland v. Wright*, 2 Munf. 179; *McLellan v. Cumberland Bank*, 24 Me. 566; *Satterfield v. Smith*, 11 Ired. L. 60; *Daniel v. Jackson*, 53 Ga. 87; *Wright v. Deklyne*, 1 Pet. C. C. 199; *Rankin v. Matthews*, 7 Ired. L. 286.

<sup>4</sup> *National Bank of Metropolis v. Sprague*, 20 N. J. 159; *Wright v. Yetts*, 30 Ind. 185; *Stead v. Course*, 4 Cranch, 403; *Blossom v. Railroad Co.*, 3 Wall. 196. See *Ashcom v. Smith*, 2 Pen. & W. 211.

bound by them.<sup>1</sup> In the absence of express conditions or of notice of them, the purchaser will take the property subject only to the implied conditions.<sup>2</sup> Conditions, which are usually imposed upon auction sales, relate to the manner of bidding, the deposit of sum of money as earnest, the signing of the contract, and the like. But almost any condition may be attached, provided its terms and scope are very clearly set forth. The statement of the conditions must be sufficiently clear to enable the purchaser to understand what they are.<sup>3</sup>

§ 285. **Competition must be fair—Manner of bidding.** The universal implied condition is that the competition between bidders, and the conduct of the sale by the auctioneer, should be fair and open.<sup>4</sup> If the auctioneer or principal employs persons to offer false bids, for the purpose of raising the price beyond what the *bona fide*

<sup>1</sup> *Freme v. Wright*, 4 Madd. 364; *Bywater v. Richardson*, 1 A. & E. 508; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Trickel v. Myers*, 18 La. Ann. 567; *Shields v. Harrison*, 77 N. C. 115; *Pope v. Burrage*, 115 Mass. 282; *Backer v. Hamilton*, 18 La. Ann. 553; *Brubaker v. Jones*, 28 Kan. 411; *Wainwright v. Read*, 1 Desau. 573; *Torrance v. Bolton*, L. R. 14 Eq. 124.

<sup>2</sup> *Ruggles v. Centerville Bank*, 43 Mich. 192; *McGown v. Wilkins*, 1 Paige, 120; *Parker v. Storts*, 15 Ohio St. 351; *Myers v. Raymond*, 5 Fla. 516; *Skull v. Glenister*, 16 C. B. (N. S.) 81; *Whittington v. Corder*, 16 Jur. 1084; *Stanton v. Tattershall*, 1 Sm. & G. 529; *Pope v. Garland*, 4 Yo. & C. 408; *Bradford v. McConihay*, 15 W. Va. 782; *Succession of Triche*, 29 La. Ann. 384; *Gillett v. Balcomb*, 6 Barb. 370; *Hotchkiss v. Clifton Air Cure*, 2 Abb. App. 406.

<sup>3</sup> *Chambers v. Tulane*, 9 N. J. Eq. 146; *Brown v. Hoff*, 5 Paige, 285; *McLean v. Green*, 2 McMull. 17; *Laight v. Pell*, 1 Edw. Ch. 577; *Lenham v. Hamann*, 14 Abb. Fr. (N. S.) 274; *Brownlee v. Campbell*, 5 App. Cas. 925; *Hanks v. Pulling*, 25 L. J. Q. B. 375; *Else v. Else*, L. R. 13 Eq. 196; *Atkins v. Howe*, 18 Pick. 11; *Osborne v. Harney*, 7 Jur. 229; *Gordon v. Sims*, 2 McCord Ch. 151; *Waterman v. Spaulding*, 51 Ill. 425; *Brown v. Wallace*, 4 Gill & J. 479; *Higgins v. Delaware, &c., R. R. Co.*, 60 N. Y. 553; *Plume v. Small*, 5 N. J. Eq. 460.

<sup>4</sup> *Fairfax v. Hopkins*, 2 Cranch C. C. 184; *Myers v. Sanders*, 7 Dana, 506; *Johnson v. Eason*, 8 Ired. Eq. 330.

competition would bring,<sup>1</sup> or the buyers form a combination, whereby one person will represent the combination, bid in the property offered for sale without competition, and divide it among the members of the combination,<sup>2</sup> the sale is voidable at the instance of the party thereby defrauded.

The bidding should be conducted in an open and fair manner; and bids obtained by secret signs from parties specially favored are not allowed.<sup>3</sup> But a valid bid may be received in advance of the sale, and be announced by the auctioneer at the sale;<sup>4</sup> and so, also, it has been held that the owner may employ an agent to bid for him.<sup>5</sup>

But if the sale is made expressly without reserve, it is unlawful for the auctioneer to receive a bid from his principal or in his behalf. A sale without reserve excludes the right of the owner of the goods to bid in his own behalf, and compels him to sell them for the highest price which the bidders by their competition may be induced to offer.<sup>6</sup> And in any case, even where the bidding by the principal is permitted, it must be openly announced at the sale. It will not be lawful for the auctioneer to receive the bids secretly.<sup>7</sup> But the creditor, at whose instance the sale is had, is not hampered in any way in his right to protect his own interests by bidding on the property.<sup>8</sup>

<sup>1</sup> See *ante*, § 165, for a fuller discussion of this question.

<sup>2</sup> See *ante*, § 169, for a fuller discussion of this fraud.

<sup>3</sup> *Conover v. Walling*, 15 N. J. Eq. 173.

<sup>4</sup> *Tyree v. Williams*, 3 Bibb, 368.

<sup>5</sup> See *ante*, § 165; *Bowles v. Round*, 5 Ves. 508; *Shaw v. Simpson*, 1 J. & W. 389; *Malins v. Freeman*, 2 Keen, 25; *Howard v. Castle*, 6 T. R. 642; *Patterson v. Preston*, 51 Md. 190; *Delves v. Delves*, L. R. 20 Eq. 77; *Jervise v. Clarke*, 1 J. & W. 392.

<sup>6</sup> *Thornett v. Haines*, 15 M. & W. 367; *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 10 Beav. 61; *Warlow v. Harrison*, 25 L. J. Q. B. 14.

<sup>7</sup> *Baham v. Bach*, 13 La. 287; *Bexwell v. Christie* 1 Cowp. 395; *Warlow v. Harrison*, 29 L. J. Q. B. 14. The bid of the principal may be announced in advance of the sale. *Else v. Barnard*, 28 Beav. 228.

<sup>8</sup> *Dexter v. Shepard*, 117 Mass. 480.

The auctioneer must receive all bids impartially, except that he may refuse the bids of irresponsible persons.<sup>1</sup> Before any bid has been accepted, either party may revoke the auctioneer's authority. But as soon as a bid has been accepted, the sale becomes binding upon both parties, and neither can withdraw. But a condition, taking away from a bidder the right to retract, is void.<sup>2</sup> But if it can be shown, after the goods have been "knocked down" to a bidder, that there had been a higher bid, which the auctioneer had not heard, the sale can be reopened, and the property given over to the one who had actually made the highest bid.<sup>3</sup>

§ 286. Statute of frauds in respect to auction sales. —

At one time it was doubted whether the provision of the statute of frauds, which required the sales of goods, wares and merchandise, under certain circumstances, to be proved by a memorandum in writing, applied to auction sales. But except the auction sales, which are likewise sales by legal process, the statute applies to these sales, as well as to private sales; and the general rule is, that, to be valid, auction sales must conform to the requirements of the statute of frauds in respect to sales of personal property.<sup>4</sup>

<sup>1</sup> Kinney v. Showdey, 1 Hill, 544; Holder v. Jackson, 11 N. C. C. P. 548; Den v. Zellers, 7 N. J. L. 158. See *ante*, § 165.

<sup>2</sup> Payne v. Cave, 3 T. R. 148; Byrne v. Van Llenhoven, 5 C. P. D. 344; Crotenkemper v. Achtermeyer, 11 Bush, 222; Manser v. Bach, 6 Hare, 448.

<sup>3</sup> Pike v. Bach, 38 Me. 302.

<sup>4</sup> Davis v. Rowell, 2 Pick. 64; People v. White, 6 Cal. 75; Baker v. Jameson, 2 J. J. Marsh. 547; Bleeker v. Franklin, 2 E. D. Smith, 93; Sanderlin v. Roman Catholic Church, R. M. Charl. 551; Burke v. Haley, 2 Gilm. 614; Hadden v. Johnson, 7 Ind. 394; Brent v. Green, 6 Leigh, 16; Christie v. Simpson, 1 Rich. 407; Elfe v. Gadsden, 2 Rich. 373; Bicknell v. Byrnes, 23 How. Pr. 486; Evans v. Ashley, 8 Mo. 177; Alexander v. Merry, 9 Mo. 510; Singstach v. Harding, 4 H. & J. 186; Pike v. Balch, 38 Me. 302; Spencer v. Pearce, 10 Gill & J. 294; Dewall v. Peach, 1 Gill, 372; Hart v. Rector, 13 Mo. 497; Bailey v. Ogden, 3 Johns. 399; Jackson v. Catlin, 2 Johns. 248; Meadows v. Meadows, 3 McCord, 458; Davis v. Robertson, 1 Mill Const. 71; Ennis v. Walker, 3 Blackf. 472; Gossard v.

But wherever a memorandum in writing is required by the statute of frauds, signed by the party to be charged, in order to bind the parties to an auction sale, the very necessity of the situation would require some departure from the rule as to signature by the parties or by their specially constituted agents; and the custom and usage of trade has supplied the implication that, while for all other purposes the auctioneer is the agent only of the seller, after the hammer has fallen, he becomes agent of both seller and buyer, for the purpose of executing a memorandum in writing of the sale, which will bind both parties to it. Hence the memorandum of the sale made and signed by the auctioneer, satisfies the requirements of the statute, and binds both parties.<sup>1</sup> Like every other memorandum of sale, this memorandum must contain every element of the contract, so that the entire contract, — the parties, the subject-matter, the considerations, the terms and condi-

Ferguson, 54 Ind. 519; Bell v. Owen, 8 Ala. 312; Ruckle v. Barbour, 48 Ind. 274; Brock v. Jones, 8 Tex. 78; Bozza v. Rowe, 30 Ill. 198; Bent v. Cubb, 9 Gray, 397.

<sup>1</sup> O'Donnell v. Leeman, 43 Me. 158; Cleaves v. Foss, 4 Greenl. 1; Episcopal Church v. Wiley, 2 Hill (S. C.) Ch. 584; Gordon v. Sims, 2 McCord Ch. 151; Doty v. Wilger, 15 Ill. 410; Burke v. Haley, 2 Gilm. (Ill.) 614; Sanborn v. Chamberlin, 101 Mass. 409; Pugh v. Chessedine, 11 Ohio, 109; White v. Crew, 16 Ga. 416; Harvey v. Stevens, 43 Vt. 653; Baptist Church v. Bigelow, 16 Wend. 28; Lewis v. Wells, 50 Ala. 198; Brent v. Green, 6 Leigh, 16; Hart v. Woods, 7 Blackf. 568; Linn Boyd, &c. Co. v. Terrill, 13 Bush, 463; Smith v. Arnold, 5 Mason C. C. 414; Gill v. Hewett, 7 Bush, 10; Hunt v. Gregg, 8 Blackf. 105; Adams v. McMillan, 7 Port. 73; McComb v. Wright, 4 Johns. Ch. 659; Tallman v. Franklin, 14 N. Y. 534; Dawson v. Miller, 20 Tex. 171; Craig v. Godfroy, 1 Cal. 415; Morton v. Dean, 13 Met. 385; Bent v. Cobb, 9 Gray, 397; Lake v. Campbell, 18 Ill. 106; Anderson v. Chick, 1 Bailey Eq. 118; Meadows v. Meadows, 3 McCord, 458; Pike v. Balch, 38 Me. 302; Alna v. Plummer, 4 Greenl. 258; Walker v. Herring, 21 Gratt. 678; Davis v. Rowell, 2 Pick. 64; Gill v. Bricknell, 2 Cush. 355; Horton v. McCarty, 53 Me. 394; White v. Watkins, 23 Mo. 423; Gwathney v. Cason, 74 N. C. 5; Mews v. Carr, 1 Exch. 484; Entz v. Mills, 1 McMull. 454; Clarkson v. Noble, 2 U. C. Q. B. 361; Buckmaster v. Harrop, 13 Ves. 450; Warlow v. Harrison, 28 L. L. J. Q. B. 18. See *ante*, §§ 57, 77.

tions of sale, — may be ascertained from a perusal of the memorandum.<sup>1</sup> But the memorandum need not be confined to one paper. The memorandum may consist of a number of detached papers, and if all the essentials of the contract may be gathered from these several papers, the statute will be satisfied, provided the papers are all attached together, or the signed paper refers to the others as being a part of the memorandum.<sup>2</sup>

The auctioneer's clerk has the same power given him by usage to sign the memorandum in the name of, or as agent of, both parties, as has the auctioneer; so that the clerk's signature satisfies the requirements of the statute.<sup>3</sup>

If the auctioneer is selling his own goods, his personal interest as seller precludes his assumption of a fiduciary position toward the buyer, and hence his memorandum of the sale will not bind the buyer.<sup>4</sup>

<sup>1</sup> *Bailey v. Ogden*, 3 Johns, 399; *Meadows v. Meadows*, 3 McCord, 458; *Ridgway v. Ingrain*, 50 Ind. 148; *Johnson v. Buck*, 35 N. J. L. 338; *McFarrow's Appeal*, 11 Pa. St. 508; *Doty v. Wilder*, 15 Ill. 407; *Lewis v. Wells*, 50 Ala. 198; *Gwathney v. Cason*, 74 N. C. 5; *Morton v. Dean*, 13 Met. 385; *Soles v. Hickman*, 20 Pa. St. 180; *Norris v. Blair*, 39 Ind. 90; *O'Donnell v. Leeman*, 43 Me. 158; *Price v. Durin*, 56 Barb. 647; *Rishton v. Whatmorr*, L. R. 8 Ch. D. 467.

<sup>2</sup> *Gowen v. Klous*, 101 Mass. 449; *Hinde v. Gale*, 7 East, 538; *Tallman v. Franklin*, 14 N. Y. 584; 3 Duer, 395; *Horton v. McCarty*, 53 Me. 394; *Price v. Durin*, 56 Barb. 647; *Adams v. McMillin*, 7 Port. (Ala.) 73; *Johnson v. Buck*, 35 N. J. L. 338.

<sup>3</sup> *Smith v. Jones*, 7 Leigh, 165; *Baptist Church v. Bigelow*, 16 Wend. 28; *Johnson v. Buck*, 35 N. J. L. 338; *Green v. Merriam*, 28 Vt. 801; *Hart v. Woods*, 7 Blackf. 568; *Alna v. Plummer*, 4 Greenl. 258; *Adams v. McMullan*, 7 Port. (Ala.) 73; *Cherry v. Long*, Phill. L. 466; *Gill v. Bicknell*, 2 Cush. 355; *Simpson v. Pettus*, 7 Ala. 543; *Doty v. Wilder*, 15 Ill. 407; *Morris v. Blair*, 39 Ind. 90; *Harvey v. Stephens*, 43 Vt. 658; *Frost v. Hill*, 3 Wend. 386; *Brent v. Green*, 6 Leigh, 16. But see *Cathcart v. Kiernaghan*, 5 Strobbh. 129; *Christie v. Simpson*, 1 Rich. 407; *Entz v. Mills*, 1 McMull. 453; *Pope v. Chafee*, 14 Rich. Eq. 69; *Meadows v. Meadows*, 3 McCord, 458; *Carmack v. Masterson*, 3 Stew. & P. 411.

<sup>4</sup> *Full v. David*, 45 Mo. 446; *Smith v. Arnold*, 5 Mason C. C. 414; *Wright v. Dannah*, 2 Comp. 205; *Bent v. Cobb*, 9 Gray, 397; *Johnson v. Buck*, 35 N. J. L. 338. The auctioneer is also disabled from acting as

§ 287. **The auctioneer's compensation.** — The auctioneer is of course entitled to a reasonable compensation. And in the absence of statutory regulation, the parties may agree upon a rate of compensation. But he does not earn his compensation until he has made a sale;<sup>1</sup> and this is true, although his sale has been prevented by the principal's private sale of the goods.<sup>2</sup> But if the sale has been completed, and through no fault of the auctioneer the sale has been set aside and the goods resold, the auctioneer will be entitled to compensation for both services.<sup>3</sup> The auctioneer has a lien for his compensation on the goods while they remain in his possession, and after their delivery on the proceeds of the sale, as long as they are in his possession.<sup>4</sup> And he may appropriate, in payment of his claim for compensation, as much of the price of the goods sold as may be necessary for that purpose.<sup>5</sup>

§ 288. **Auctioneer, when liable as vendor.** — Like every other agent, the auctioneer is not liable as principal, where he lets the owner of the goods be known to the bidders,<sup>6</sup> as long as he does not become a participant in some wrongful act of commission; as, for example, where he sells goods which he knows do not belong to his principal,<sup>7</sup> and even when he did not know that they were the property of another. Even in that case, the auctioneer is liable

the agent of the buyer in making the memorandum, where he held the property as guardian. *Bent v. Cobb*, 9 Gray, 397.

<sup>1</sup> *Cochran v. Johnson*, 2 McCord, 21; *Cannon v. Kelly, Hayes & J.* 655; *Ward v. James*, 8 Hun, 526.

<sup>2</sup> *Simpson v. Lamb*, 17 C. B. 608; *Girardey v. Stone*, 24 La. Ann. 286

<sup>3</sup> *Benner's Estate*, 3 Brewst. 398. But see *Succession of Navarro*, 24 La. An. 105.

<sup>4</sup> *Williams v. Millington*, 1 H. Bl. 81; *Succession of Dowler*, 29 La. Ann. 437; *Woolfe v. Horne*, L. J. 46 Q. B. 534.

<sup>5</sup> *Harlow v. Sparr*, 15 Mo. 184.

<sup>6</sup> *Dugdale v. Lovering*, L. R. 10 C. P. 196.

<sup>7</sup> *Hardacre v. Stewart*, 5 Esp. 104.

in trover to the real owner of the goods.<sup>1</sup> He is also liable for allowing by-bidding in a sale without reserve when he makes the sale without disclosing the name of his principal.<sup>2</sup>

<sup>1</sup> *Hoffman v. Carow*, 22 Wend. 285; *Hills v. Snell*, 104 Mass. 178; *Coles v. Clark*, 3 Cush. 399; *Rogers v. Hine*, 1 Cal. 429; *Courtis v. Cane*, 82 Vt. 282; *Gilmore v. Newton*, 9 Allen, 171; *Williams v. Merle*, 11 Wend. 80.

<sup>2</sup> *Stahl v. Charles*, 5 Abb. Pr. 348; *Bush v. Cole*, 28 N. Y. 261; *Mauri v. Heffernan*, 18 Johns. 58; *Schell v. Stephens*, 50 Mo. 375; *Warlow v. Harrison*, 28 L. J. Q. B. 18; *Hanson v. Roberdeane*, Peake N. P. C. 163; *McComb v. Wright*, 4 Johns. Ch. 659; *Mills v. Hunt*, 20 Wend. 431; *Fowle v. Leavitt*, 28 N. H. 360.



## CHAPTER XX.

### ILLEGAL SALES.

- SECTION 290. General propositions — Presumption of legality.**  
291. By what law is legality of sale determined.  
292. Effect of partial illegality.  
293. Effect of execution of illegal sales.  
294. Sales for an unlawful purpose, when illegal.  
295. Sales illegal at common law.  
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303. Contracts in restraint of trade.  
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305. Offenses against morality.  
306. Sales in violation of statutes.  
307. Sales of smuggled goods.  
308. Sunday sales.  
309. Sales of intoxicating liquors.

§ 290. **General propositions — Presumption of legality.** — A sale is illegal, whenever it is prohibited by law, expressly or by implication. A sale is presumed to be valid, until it is shown to be illegal, and the burden of proving its illegality is on the party who alleges it.<sup>1</sup> And if a sale is valid at common law, it is presumed to be legal in every State in which the common law prevails, and a

<sup>1</sup> *Wilson v. Melvin*, 13 Gray, 73; *Trott v. Irish*, 1 Allen, 481; *Pratt v. Langdon*, 97 Mass. 97; *Brigham v. Potter*, 14 Gray, 522.

statute to the contrary must be affirmatively established.<sup>1</sup> But, notwithstanding this general presumption in favor of the legality of a sale, the sale is made illegal by statute, although the statute does not expressly declare it to be void. There are three forms which the statute may assume: the sale may be declared void; it may be simply prohibited; and the seller may be subjected to a penalty for making the sale, without the sale being prohibited or declared void. In all three cases, it is held that the sale will be void.<sup>2</sup>

An illegal sale is absolutely void, not voidable, and hence there can be no ratification of it,<sup>3</sup> not even after the repeal of the law which made it illegal. A sale is illegal or not, according to the law in force when the sale was made,<sup>4</sup> and a promise to pay for the goods, after a repeal of the law, is not binding, unless it is based upon some new consideration.<sup>5</sup>

§ 291. By what law is legality of sale determined. — The legality of a sale is determined by the law of the place

<sup>1</sup> *Adams v. Gay*, 19 Vt. 358; *Doolittle v. Lyman*, 44 N. H. 608; *Corning v. Abbott*, 54 N. H. 469; *Tuttle v. Hollaid*, 43 Vt. 542; *O'Rourke v. O'Rourke*, 43 Mich. 58.

<sup>2</sup> *Bancroft v. Dumas*, 21 Vt. 456; *Mitchell v. Smith*, 1 Binn. 110; *Miller v. Post*, 1 Allen, 435; *Griffith v. Wells*, 3 Denio, 227; *Barton v. Port Jackson, &c., Ice Co.*, 17 Barb. 404; *Buxton v. Hamblen*, 32 Me. 348; *Woods v. Armstrong*, 54 Ala. 150; *Roby v. West*, 4 N. H. 285.

<sup>3</sup> *Story on Sales*, § 617; *Day v. McAllister*, 15 Gray, 433; *Pope v. Linn*, 50 Me. 83; *Vinz v. Beatty*, 61 Wis. 645; *Reaves v. Butcher*, 31 N. J. L. 224; *Kountz v. Price*, 40 Miss. 341; *Catlett v. Trustees*, 62 Ind. 365; *Parker v. Pitts*, 73 Ind. 597; *Trolwert v. Decker*, 51 Wis. 46; *Ryno v. Darby*, 20 N. J. Eq. 231; *Guinn v. Simes*, 61 Mo. 335; *Shippey v. Eastwood*, 9 Ala. 198; *Ladd v. Rogers*, 11 Allen, 209. But in some of the States, Sunday contracts are voidable only, and may therefore be ratified. *Adams v. Gray*, 19 Vt. 338; *Sayles v. Wellman*, 10 R. I. 465; *Campbell v. Young*, 9 Bush, 240; *Huhns v. Gates*, 92 Ind. 66; *Tucker v. West*, 29 Ark. 386; *Smith v. Case*, 2 Oreg. 190. See *post*, § 308.

<sup>4</sup> *Roby v. West*, 4 N. H. 285; *Woods v. Armstrong*, 54 Ala. 150; *Decell v. Lewenthal*, 57 Miss. 331; *Bancher v. Mansel*, 47 Me. 58; *Hathaway v. Moran*, 44 Me. 67.

<sup>5</sup> *Ludlow v. Hardy*, 38 Mich. 690; *Dever v. Corcoran*, 3 Allen (N. B.), 338.

where the contract of sale is made and performed. If the place of performance is different from the place of contract, the law of the former place governs. Ordinarily, the contract of sale is fully performed in the place where the sale was made; and a delivery of goods to a common carrier for transportation to the buyer is such a completion of the sale, as to make its validity depend upon the law of the place where the sale was made. And if valid by that law, it cannot be affected by the law of the place to which the goods are sent, and from which the buyer ordered them.<sup>1</sup> But if title does not pass on delivery to the common carrier, because the bill of lading is made out in the name of the seller, and provides for the goods to be delivered to him, instead of to the buyer,<sup>2</sup> or because the sale is conditional upon the right to return the goods, if they do not prove to be satisfactory, in either case the contract is not fully performed, until the bill of lading has been indorsed and delivered to the vendee, or the condition has been performed. In these cases, therefore, the legality of the sale must be determined by the law of the place where the vendee receives the bill of lading or the goods, or he performs the condition.<sup>3</sup> It has also been held that the sale is not complete on delivery to the common carrier, where the vendor is to pay the freight on the goods,<sup>4</sup> and where the goods were sent "C. O. D.;"<sup>5</sup> but these conclusions cannot be

<sup>1</sup> Tuttle v. Holland, 43 Vt. 542; Garland v. Lane, 46 N. H. 245; Finch v. Mansfield, 97 Mass. 89; Abberger v. Marrin, 102 Mass. 70; Torrey v. Corliss, 33 Me. 336; McCarty v. Gordon, 16 Kan. 85; Kling v. Fries, 83 Mich. 275; Frank v. Hoey, 128 Mass. 263; Boothby v. Plaisted, 51 N. H. 436; Kline v. Baker, 99 Mass. 253; Merchant v. Chapman, 4 Allen, 364; Mack v. Lee, 13 R. I. 298.

<sup>2</sup> See *ante*, § 95.

<sup>3</sup> Wilson v. Stratton, 47 Me. 120; Collender Co. v. Marshall, 57 Vt. 232; Schlesinger v. Stratton, 9 R. I. 578.

<sup>4</sup> See Suit v. Woodhall, 113 Mass. 391; Tohnan v. Johnson, 43 Iowa, 129.

<sup>5</sup> State v. O'Neill, 58 Vt. 140.

considered sound, unless they are supported by the fact that the parties did not intend that the title to the goods should pass until they were actually delivered to the buyer.

§ 292. **Effect of partial illegality.**— If a sale is made of several articles for one price, and the sale of some of these articles is prohibited, while the sale of the others is legal, the whole sale is tainted by the illegality, and no recovery can be had on the sales of any of the articles. It is not considered to be consistent with public policy for the courts to undertake the apportionment of the price between the legal and the illegal considerations, and the avoidance of the whole contract is but a merited penalty for engaging in questionable proceedings.<sup>1</sup> But if an instrument of indebtedness, such as a note, is founded upon two or more distinct and severable sales, one of which is illegal, although there are authorities to the contrary,<sup>2</sup> the better opinion is, that no action can be maintained on the instrument for the recovery of the legal part: but since the parts of the con-

<sup>1</sup> *Holt v. O'Brien*, 15 Gray, 311; *Bligh v. James*, 6 Allen, 570; *Robinson v. Bland*, 2 Burr. 1077; *Scott v. Gilmore*, 3 Taunt, 226; *Chapman v. Black*, 2 B. & Ald. 588; *Cruikshanks v. Rose*, 5 C. & P. 19; *Owens v. Porter*, 4 C. & P. 367; *Craig v. Andrews*, 7 Iowa, 17; *Taylor v. Pickett*, 52 Iowa, 467; *Quigley v. Duffey*, 52 Iowa, 610; *Perkins v. Cummings*, 2 Gray, 258; *Brigham v. Potter*, 14 Gray, 522; *Hoyt v. Macon*, 2 Col. 502; *Carlton v. Woods*, 28 N. H. 292; *Coburn v. Odell*, 20 N. H. 540; *Barnard v. Backhaus*, 52 Wis. 593; *Gardner v. Maxey*, 9 B. Mon. 90; *Hyndes v. Hayes*, 25 B. Mon. 81; *Deering v. Chapman*, 22 Me. 488; *Averbeck v. Hall*, 14 Bush, 505; *Saratoga Bank v. King*, 44 N. Y. 87; *Woodruff v. Hinman*, 11 Vt. 592; *Gamble v. Grimes*, 2 Ind. 392; *Everhart v. Packett*, 73 Ind. 409; *Snyder v. Wiley*, 38 Mich. 483; *Wisner v. Bardwell*, 38 Mich. 278; *Wynne v. Whisenant*, 37 Ala. 46; *Covington v. Threadgill*, 88 N. C. 186; *Widoe v. Webb*, 20 Ohio St. 431; *Wilkins v. Riley*, 47 Miss. 306; *Cotten v. McKenzie*, 57 Miss. 418; *Hyslop v. Clarke*, 14 Johns. 465; *Clark v. Ricker*, 14 N. H. 44; *Chandler v. Johnson*, 39 Ga. 85; *Kidder v. Blake*, 45 N. H. 530.

<sup>2</sup> *Clopton v. Elkin*, 46 Miss. 95. See *Guild v. Belcher*, 119 Mass. 257; *McGuinness v. Bligh*, 11 R. I. 94; *Bron v. Becnel*, 20 La. Ann. 254; *s. c.* 22 La. Ann. 189.

sideration are separate and distinct, the illegality of one part cannot affect the right of action on the legal part, which exists independently of the instrument of indebtedness.<sup>1</sup>

It has been held that where the legal part of the consideration exceeds in amount the entire instrument of indebtedness, the illegality of another part of the consideration will not annihilate the instrument.<sup>2</sup> And if there are several, given in the same transaction, or at the same time, and each of them exceeds in amount the illegal consideration, the holder may apply the defense to either of the instruments, as he may elect.<sup>3</sup> It would be difficult to say to which of them the defense should apply, when both had been assigned, so that they are held by different parties. If only one of them had been assigned, it follows, as a consequence of the inequality of equity between the original holder and a subsequent indorsee, and the liability as a guarantor of an indorser, that the original holder should

<sup>1</sup> In *Widoe v. Webb*, 21 Ohio St. 481, the action was on a note, given in settlement of an account, of which some of the items were for intoxicating liquors sold in violation of the law. Scott, C. J.: "With respect to the items of the plaintiff's account, which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note, which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: 'It is but a reasonable punishment for his including with his just due that which he had no right to take.'" *Robinson v. Bland*, 2 Burr. 1077; *Hanover v. Doane*, 12 Wall. 342; *Perkins v. Cummings*, 2 Gray, 258; *Brigham v. Potter*, 14 Gray, 522; *Clark v. Ricker*, 14 N. H. 44; *Carlton v. Bailey*, 27 N. H. 234; *Carlton v. Woods*, 28 N. H. 290; *Hart v. Macon*, 2 Col. 508.

<sup>2</sup> *Warren v. Chapman*, 105 Mass. 87.

<sup>3</sup> *Carradine v. Wilson*, 61 Miss. 573.

have the defense prevail against him. Whether the indorsee would have the right to compel such a disposition of the defense so that the obligor may be prevented from setting up the defense in the action by the indorsee, depends upon the question, whether the acknowledged right of the original holder to make the election passes by indorsement of one of the instruments to the indorsee. We see no reason why it should not. But where both instruments have been transferred to *bona fide* purchasers, and the illegality of the consideration avoids the instruments, even in the hands of the innocent indorsee,<sup>1</sup> the equities of the indorsee being equal, it is difficult to say in the absence of adjudication, what would be the ruling principle.

But whether notes and other instruments of indebtedness are absolutely or only partially void, which are given in part for the price of an illegal sale, it is settled that if the note is declared void *in toto*, the seller may recover the price of the legal sales, leaving out of his claim the illegal sales which helped to make up the consideration of the note.<sup>1</sup>

§ 293. **Effect of execution of illegal sales.**—If a sale is illegal, both parties to the sale participate in the violation of the law; and hence, on grounds of public policy, the courts will not relieve either party from the effect of executing the sale. If a sale is executed by both or by either party, they will not be restored to their original condition, the seller retaining the price if it is paid,

<sup>1</sup> See Tiedeman Commercial Paper, § 178.

<sup>2</sup> McKnight v. Devlin, 52 N. Y. 299; Gelpcke v. Dubuque, 1 Wall. 321; Coburn v. Odell, 30 N. H. 557; Carleton v. Woods, 28 N. H. 290; Towle v. Blake, 38 Me. 528; Thurston v. Percival, 1 Pick. 415; Hanauer v. Gray, 25 Ark. 350; Erie R. R. Co. v. Union Exp. Co., 35 N. J. L. 240; Lange v. Werk, 2 Ohio St. 519; Goodwin v. Clark, 65 Me. 280; Boyd v. Eaton, 44 Me. 51; Walker v. Lovell, 28 N. H. 138; Foreman v. Ahl, 55 Pa. St. 325; Pecker v. Kennison, 28 N. H. 290; Filson v. Hives, 5 Pa. St. 452; Crookshank v. Rose, 5 C. & P. 19; Hinde v. Gray, 1 Man. & G. 195.

and the buyer retaining the goods if delivered,<sup>1</sup> although, on the ground that the title to the goods cannot pass by a void illegal sale, it would not seem unreasonable, apart from any question of public policy to hold that the seller may replevin the goods which had been illegally sold.<sup>2</sup> But whatever may be the correct rule in this respect, the seller could not recover the price for goods delivered in pursuance of an illegal sale. Even *assumpsit* will not lie for their value.<sup>3</sup>

§ 294. **Sales for an unlawful purpose, when illegal.** — Where a thing may be put to a lawful, as well as to an unlawful use, it is only illegal to buy or sell the goods for the unlawful purpose. The seller has a right to sell, and the buyer the right to buy, them if they are not intended to be put to the unlawful use. But if they are bought for the purpose of violating the law in the use or further sale of them, the contract of sale is clearly illegal, so far as the buyer is concerned, and he would be denied all right of action on the contract, should the seller refuse to execute the sale.<sup>4</sup>

<sup>1</sup> *Horton v. Buffington*, 105 Mass. 399; *Moore v. Murdoch*, 26 Cal. 514; *Shuman v. Shuman*, 27 Pa. St. 90; *Chestnut v. Harbaugh*, 78 Pa. St. 478; *King v. Green*, 6 Allen, 139; *Johnson v. Willis*, 7 Gray, 164; *Kinney v. McDermott*, 55 Iowa, 674; *Ellis v. Hammond*, 57 Ga. 179; *Greene v. Godfrey*, 44 Me. 25; *Block v. McMurray*, 56 Miss. 217; *Meyers v. Meinrath*, 101 Mass. 366.

<sup>2</sup> *Magee v. Scott*, 9 Cush. 148; *Tucker v. Mowrey*, 12 Mich. 378. And see *Winfield v. Dodge*, 45 Mich. 355.

<sup>3</sup> *O'Donnell v. Sweeney*, 5 Ala. 467; *Pike v. King*, 16 Iowa, 49; *Meador v. White*, 66 Me. 90; *Trolwert v. Decker*, 51 Wis. 46; *Tucker v. West*, 29 Ark. 386; *Finn v. Donahue*, 35 Conn. 216; *Adams v. Hammell*, 2 Dougl. 78; *Foreman v. Ahl*, 55 Pa. St. 325; *Day v. McAllister*, 15 Gray, 438; *Pope v. Linn*, 50 Me. 83; *Vinz v. Beatty*, 61 Wis. 645; *Reeves v. Butcher*, 31 N. J. L. 224; *Kountz v. Price*, 40 Miss. 341; *Catlett v. Trustees*, 62 Ind. 365; *Thompson v. Williams*, 58 N. H. 248; *Parker v. Pitts*, 73 Ill. 597; *Ryno v. Darby*, 20 N. J. Eq. 231; *Guinn v. Simes*, 61 Mo. 335; *Shippey v. Eastwood*, 9 Ala. 198; *Ladd v. Rogers*, 11 Allen, 209.

<sup>4</sup> 2 Schouler's Personal Prop., § 617. See *Pringle v. Corporation*

But the same contract may be binding on the buyer, if the goods could have been put to a lawful use, and the seller could not be considered under the circumstances of the particular case as a *particeps criminis*. It is very clear that the seller cannot recover on the contract of sale, if he in any way participated in the unlawful act of the buyer by packing and marking the goods in such a way as to enable the buyer more successfully to put the goods to an unlawful use. For example, where the vendor of intoxicating liquors, in a sale of them to one who lives in a State where such sale is illegal and who intends to sell them in the latter State in violation of the law, disguises by packing and marking the character of the goods so that the buyer might the better succeed in selling them without detection, the sale is illegal, and the vendor cannot recover the price.<sup>1</sup> And the same conclusion was reached, where American sardines were put up in boxes with French labels, in order to enable the retail dealer to sell them as French sardines.<sup>2</sup> The slightest aid or participation in the unlawful use of the goods by the buyer will incriminate the seller.<sup>3</sup> And some of the authorities hold that the sale will be illegal as to the seller, if it is made by him "with the express purpose" or "with the intent" to enable the vendee to sell or use them in violation of the law, although the seller does not aid the buyer in his violation of the law, except by fur-

of Napanee, 48 Up. Can. Q. B. 285; *Cowan v. Melbourne*, L. R. 2 Ex. 230.

<sup>1</sup> *Shiff v. Johnson*, 57 N. H. 475; *Fisher v. Lord*, 63 N. H. 514; *Hull v. Ruggles*, 56 N. Y. 425; *Feineman v. Sachs*, 33 Kan. 621; *Hill v. Speer*, 50 N. H. 253; *Holman v. Johnson*, Cowp. 348.

<sup>2</sup> *Materne v. Horwitz*, 18 Jones & Sp. 41; *s. c.* 101 N. Y. 469. See *Honneger v. Wettstein*, 15 J. & S. 125.

<sup>3</sup> *Hubbell v. Flint*, 13 Gray, 277; *Gaylord v. Soragen*, 32 Vt. 110; *Alken v. Blaisdell*, 41 Vt. 656; *Arnot v. Pittston Coal Co.*, 68 N. Y. 558; *McIntire v. Parks*, 3 Met. 207; *Smith v. Godfrey*, 28 N. H. 379; *Banchor v. Mansell*, 47 Me. 58; *Orcutt v. Nelson*, 67 Mass. 536; *Tracy v. Talmadge*, 14 N. Y. 162; *President, &c., of Merchants' Bank v. Spaulding*, 12 Barb. 302; *Kottwitz v. Alexander*, 11 Cush. 222.



nishing him with the goods.<sup>1</sup> But the purpose or intent to enable the buyer to violate the law cannot be established except by the fact that the goods sold cannot be reasonably used for any other but an unlawful purpose, as where one manufactures and sells furniture which is suitable only for use in a bar-room or gambling house,<sup>2</sup> or where he actively aids the buyer in the accomplishment of the unlawful purpose. In the absence of such facts from the case, it is difficult to understand how the seller's purpose or intent to assist the buyer in his violation of the law can be established. This would certainly operate against the presumption to which the seller is entitled, that he intended to sell the goods for the lawful purpose, and not for the unlawful purpose.

There is also a tendency on the part of some of the courts to hold that if the seller sells when he knows that the buyer intends to commit some felony or heinous crime with it, as in the purchase of poisonous drugs for the purpose of killing some one with it<sup>3</sup> or the purchase of horses to be used in the service of rebels against the government,<sup>4</sup> and the like, he cannot recover the price.<sup>5</sup> But, notwithstanding these apparent and actual exceptions, the general rule is accepted throughout the United States that mere knowledge of the seller that the buyer intends to put the goods to an unlawful use, where the goods are likewise susceptible of a lawful use, will not make the sale illegal, and consequently prevent the recovery of the price of the goods.

<sup>1</sup> *White v. Buss*, 3 Cush. 448; *Galligan v. Fannan*, 7 Allen, 255; *Buckman v. Bryan*, 3 Denio, 340; *Webster v. Munger*, 8 Gray, 584; *Davis v. Brownson*, 6 Iowa, 410; *Distilling Co. v. Nutt*, 34 Kan. 724; *Territt v. Barlett*, 21 Vt. 184; *McConike v. McMann*, 27 Vt. 95.

<sup>2</sup> See *Tatum v. Kelly*, 25 Ark. 201, for a general discussion of this question.

<sup>3</sup> *Langston v. Hughes*, 1 Maule & S. 593.

<sup>4</sup> *Martin v. McMillan*, 65 N. C. 199; *Hanauer v. Doane*, 12 Wall. 342, 347. See *McGavock v. Puryear*, 6 Cold. 84.

<sup>5</sup> *Pearce v. Brooks*, L. R. 1 Ex. 212.

The sale will be illegal as to the buyer, but legal as to the seller.<sup>1</sup>

§ 295. **Sales illegal at common law.** — Sales are illegal at common law because the subject-matter is intended to be used for some criminal or immoral purpose; or because the sale itself is illegal for being against public policy. Some examples of illegal sales, according to the common law, will be stated and explained somewhat in detail in subsequent paragraphs.<sup>2</sup> But inasmuch as most of the sales, which are illegal at common law, are made so because of the illegality of the consideration for the sale, many of the examples are found to be common to many sorts of contracts which are invalidated on account of the illegality of the consideration, and hence some of the cited cases will be found to come from other forms of contract; but they illustrate the principle just as well.

§ 296. **Compounding of crimes and misdemeanors as a consideration.** — Since the efficient enforcement of the criminal law is highly essential to the public welfare, any

<sup>1</sup> *Bishop v. Honey*, 34 Tex. 245; *Cheney v. Duke*, 10 G. & J. 11; *Green v. Collins*, 3 Cliff. 494; *McIntyre v. Parks*, 3 Met. 207; *Smith v. Godfrey*, 28 N. H. 379; *Wallace v. Lark*, 12 S. C. 578; *Tracy v. Talmage*, 14 N. Y. 162; *Tuttle v. Holland*, 43 Vt. 542; *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. Andrews*, 41 Tex. 363; *Curran v. Downs*, 3 Mo. App. 468; *Hedges v. Wallace*, 2 Bush, 442; *Bickely v. Sheets*, 24 Ind. 1; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Tedder v. Odom*, 2 Heisk. 68; 4 Heisk. 668; *Michael v. Bacon*, 49 Mo. 474; *Hill v. Spear*, 50 N. H. 253; *McGavock v. Puryear*, 6 Coldw. 34; *Sortwell v. Hughes*, 1 Curtis, 245; *Kreiss v. Selligman*, 8 Barb. 489; *Mahood v. Tealza*, 26 La. Ann. 108; *Hubbard v. Moore*, 24 La. Ann. 591; *Feineman v. Sacks*, 33 Kan. 651; *Holman v. Johnson*, 1 Cowp. 341; *Gaylord v. Soragen*, 32 Vt. 110. But see *Territt v. Bartlett*, 21 Vt. 184; *Roquemore v. Alloway*, 33 Tex. 461; *Milner v. Patton*, 49 Ala. 423; *State v. Blakeman*, 49 Mo. 604; *Alexander v. Lewis*, 47 Tex. 481; *Railey v. Gay*, 20 La. Ann. 158; *McMurtry v. Ramsey*, 25 Ark. 238, 349, 376; *Lewis v. Latham*, 74 N. C. 283; *Steele v. Curle*, 4 Dana, 385; *McConihe v. McManny*, 27 Vt. 95.

<sup>2</sup> See *post*, §§ 296-305.

commercial instrument given in consideration of dismissing a criminal prosecution is illegal and void. This is called compounding of crimes, and is an offense of the most serious nature. Such an act cannot be a valid consideration for any kind of contract.<sup>1</sup> A promise not to institute a prosecution is as illegal a consideration as the dismissal of a prosecution already instituted.<sup>2</sup> And so, also, is an agreement "to use all legal and proper endeavor" to have a prosecution dismissed.<sup>3</sup> Compounding the inferior misdemeanors is illegal as well as compounding felonies.<sup>4</sup>

But where the agreement is to suppress proceedings only criminal in form, and involving no criminal offense, it is not illegal.<sup>5</sup> It has also been held that the promise to discontinue bastardy proceedings, a *quasi*-criminal process, is a good legal consideration for a contract.<sup>6</sup> It is also not

<sup>1</sup> *Edgecombe v. Rodd*, 5 East, 294; *Galton v. Taylor*, 7 T. R. 475; *Brett v. Tomlinson*, 16 East, 293; *Elworthy v. Bird*, 2 Sim. & Stu. 372; *Clubb v. Hutson*, 18 C. B. (N. S.) 414; *Johnson v. Ogilby*, 3 P. Wms. 272; *Harding v. Cooper*, 1 Stark. 467; *Wallace v. Hardacre*, 1 Camp. 45; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Commonwealth v. Pease*, 16 Mass. 91; *Clark v. Pomeroy*, 4 Allen, 534; *Hinesborough v. Sumner*, 9 Vt. 23; *Hinds v. Chamberlain*, 6 N. H. 225; *Clark v. Ricker*, 14 N. H. 44; *Farrar v. Davis*, 53 Vt. 597; *Murphy v. Bottomer*, 40 Mo. 67; *Sumner v. Summers*, 54 Mo. 340; *Breathwit v. Rogers*, 32 Ark. 758; *Collier v. Waugh*, 64 Ind. 456; *Chandler v. Johnson*, 39 Ga. 85; *Kimbrough v. Lane*, 11 Bush, 556; *Cain v. Southern Express*, 1 Baxt. 315; *Wynne v. Whisenant*, 37 Ala. 46; *Commonwealth v. Johnson*, 3 Cush. 454; *Porter v. Havens*, 37 Barb. 343; *Steuben Co. Bank v. Matthewson*, 5 Hill, 249; *Vincent v. Groom*, 1 Yerg. 430; *Bell v. Wood*, 1 Bay, 249; *Merrill v. Carr*, 60 N. H. 114; *Doyle v. Carroll*, 28 U. C. C. P. 218; *Roll v. Ragnet*, 4 Ohio, 400.

<sup>2</sup> *Gardner v. Maxey*, 9 B. Mon. 90.

<sup>3</sup> *Averbeck v. Hall*, 14 Bush, 505; *Rickets v. Harvey*, 78 Ind. 152; *Shenk v. Phelps*, 6 Bradw. 612.

<sup>4</sup> *Jones v. Rice*, 16 Pick. 440.

<sup>5</sup> *Soule v. Bonny*, 37 Me. 128.

<sup>6</sup> *Hook v. Pratt*, 78 N. Y. 371; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Knight v. Priest*, 2 Vt. 507; *Cutter v. Collis*, 12 Cush. 233; *Hays v. McFarlan*, 32 Ga. 699; *Jackson v. Finney*, 33 Ga. 512; *Merritt v. Fleming*, 42 Ala. 234; *Maxwell v. Campbell*, 8 Ohio St. 265; *Haven v. Hobbs*, 1 Vt. 238; *Burger v. Strangham*, 7 J. J. Marsh 588; *Robinson v. Crenshaw*, 2

illegal to give property in settlement of any civil action in tort for damages.<sup>1</sup>

Of the same character as the compounding of crimes, is the prevention of a conviction by the suppression of evidence. Agreements to suppress evidence are illegal, and a sale or other contract made in consideration of such an agreement is invalid.<sup>2</sup>

It is illegal to agree to dismiss a prosecution for embezzlement or larceny, even when the amount paid or promised is the same as that which had been taken. The private wrong, involved in the act of larceny or embezzlement, is lost sight of in the greater wrong against the public.<sup>3</sup> But where the money is promised to be paid, without any stipulations that the prosecution was to be dismissed, and without any promise of clemency of any kind, the agreement is legal and binding, notwithstanding the prosecution was subsequently dismissed.<sup>4</sup>

§ 297. **Contracts with alien enemies and in aid of rebellion.** — All contracts with alien enemies are void, and it follows, as a matter of course, that any commercial instru-

Stew. & P. 176; Hicks v. Gregory, 8 C. B. 378; Jennings v. Brown, 9 M. & W. 496.

<sup>1</sup> Price v. Summers, 2 South. 578. See also Drage v. Iberson, 2 Esp. 643; Coppock v. Bower, 4 M. & W. 361; Kneeshaw v. Collier, 30 U. C. C. P. 265; Walbridge v. Arnold, 21 Conn. 425; Whitenack v. Ten Eyck, 2 Green Ch. 249; Prescott v. Ward, 10 Allen, 208; Lyons v. Stephens, 45 Ga. 141; Jones v. Rittenhouse, 87 Ind. 348.

<sup>2</sup> Nerot v. Wallace, 3 T. R. 17; Fallows v. Taylor, 7 T. R. 475; Edgecome v. Rodd, 5 East, 294; Swan v. Chandler, 8 B. Mon. 97; Gardner v. Maxey, 9 B. Mon. 90; Hoyt v. Macon, 2 Col. 502.

<sup>3</sup> Taylor v. Jacques, 106 Mass. 291; Hinesborough v. Sumner, 9 Vt. 23; Sumner v. Summers, 54 Mo. 340; Godwin v. Crowell, 56 Ga. 566; Buck v. Frist Nat. Bank, 27 Mich. 292. But see, *contra*, Bibb v. Hitchcock, 49 Ala. 468; Crowler v. Reed, 80 Ind. 1. It has also been held that a threatened prosecution is a sufficient consideration for the indorsement as surety by a third person. Jaffrey v. Brown, 74 N. Y. 393.

<sup>4</sup> Von Windisch v. Klaus, 46 Conn. 433; Cohoes v. Cropsy, 55 N. Y. 685; Armstrong v. Southern Express Co., 4 Baxt. 376.

ment given in liquidation of such a contract would be founded upon an illegal consideration.

For the same reasons, all contracts in aid of a rebellion against the government are illegal, and commercial paper given in settlement of such contracts is void. This rule has been followed in a number of cases, in which aid had in various ways been given to the Confederacy of the Southern States in their operations against the government of the United States. Commercial paper given in consideration of that aid was declared to be void.<sup>1</sup> But the fact that a note was given by a Confederate officer for a horse, apparently for army use, but not avowedly so, does not make the note illegal.<sup>2</sup>

§ 298. **Bribery.**—All forms of bribery of public officials are of course illegal, and commercial instruments, made for the purpose of influencing any one in the performance of a public duty, are void on account of the illegality of the consideration. It is a sale of official influence or power, and is of course illegal. This is the case, whether the paper be given to secure a public office by influencing one who has the power to appoint or elect,<sup>3</sup> or to secure some

<sup>1</sup> *Hanauer v. Doane*, 12 Wall. 342; *Critcher v. Holloway*, 64 N. C. 526; *Kingsbury v. Gooch*, 64 N. C. 528; *Kingsbury v. Fleming*, 66 N. C. 524; *Martin v. McMillan*, 63 N. C. 486; *Tatum v. Kelly*, 25 Ark. 209; *McMurtry v. Ramsey*, 25 Ark. 350; *Brooker v. Robbins*, 26 Ark. 660; *Chancely v. Bailey*, 37 Ga. 532; *Pickens v. Eskridge*, 42 Miss. 114; *Stewart v. Bosley*, 19 La. Ann. 439; *Wright v. Stacey*, 19 La. Ann. 449; *Heidenreich v. Leonard*, 21 La. Ann. 628.

<sup>2</sup> *Theford v. McClintock*, 47 Ala. 647.

<sup>3</sup> *Parsons v. Thompson*, 1 H. Bl. 322; *Laying v. Paine*, Wills. 571; *Balmer v. Bate*, 2 Brod. & Bing. 673; *Harrington v. Klopogge*, 2 Brod. & Bing. 678; *Blackford v. Preston*, 8 T. R. 93; *Stackpole v. Earle*, 2 Wills. 133; *Richardson v. Mellish*, 2 Bing. 229; *s. c.* 9 Moore, 435; *Ferris v. Adams*, 23 Vt. 136; *Nichols v. Mudgett*, 32 Vt. 546; *Martin v. Wade*, 37 Cal. 168; *King v. Pitt*, 1 W. Bl. 380; *Allen v. Hearn*, 1 T. R. 56; *Lulston v. Norton*, 3 Burr. 1235; *Webb v. Smith*, 4 Bing N. C. 373; *Swayze v. Hull*, 3 Halst. 54; *Commissioners of Johnson Co. v. Milliken*, 7 Blackf.

301. Contracts in relation to the procurement of offices in the service of

favor of the officer, or to influence him in other ways, to the benefit of the promisor or of a third person, in the discharge of his official duties.<sup>1</sup> It is illegal to promise *extra* compensation to a public officer, to induce extra diligence in the performance of his duties.<sup>2</sup> But, although it is illegal to promise to indemnify an officer against damage from his unlawful acts,<sup>3</sup> it is permissible to indemnify an officer against loss where he in good faith does what he thinks he has a right to do, but about which he might be mistaken. Bonds of indemnity of this kind are very common.<sup>4</sup>

§ 299. *Lobbying.* — Although “lobbying,” when done in a dignified and unobjectionable manner, unaccompanied by any form of bribery, is not illegal, yet since there is so much danger of the lobbyist using improper means to influence the legislators, the services of a lobbyist are never held to be a legal consideration for a contract.<sup>5</sup>

a private corporation are considered to be on a different basis, and public policy does not require them to be declared illegal. *Peck v. Requa*, 18 Gray, 407. But it has been held that an administrator of another's estate is a public officer in this sense, and a note given for procuring one's appointment as administrator is void. *Porter v. Jones*, 52 Mo. 399. Of the same character are commercial obligations given to induce a public officer to resign and exert his influence in favor of the obligor's appointment to the office, *Meacham v. Dow*, 32 Vt. 721; or to induce one candidate to withdraw in favor of another, *Ham v. Smith*, 87 Pa. St. 63. See also *Gray v. Hook*, 4 N. Y. 449; *Martin v. Wade*, 37 Cal. 168.

<sup>1</sup> *Bell v. Quin*, 2 Sandf. 146; *Tool Company v. Norris*, 2 Wall. 45; *Alston v. Atlay*, 6 Nev. & M. 686; *Denny v. Lincoln*, 5 Mass. 385; *Dealin v. Brady*, 36 N. Y. 531; *Goodale v. Holdridge*, 2 Johns. 193; *Wheeler v. Bailey*, 13 Johns. 366; *Bills v. Comstock*, 12 Met. 468; *Totteridge v. Mackally*, Sir Wm. Jones, 341; *Rogers v. Reeves*, 1 T. R. 418; *Samuel v. Evans*, 2 T. R. 569; *Watson v. Fetcher*, 8 B. & C. 25; *Ashley v. Dillon*, 19 Mo. 619.

<sup>2</sup> *Hatch v. Mann*, 15 Wend. 44.

<sup>3</sup> 10 Co. 102; *Yelv.* 197; *Cro. Eliz.* 199.

<sup>4</sup> *Cro. Jac.* 652; 1 *Ld. Raym.* 279. But an indemnity bond cannot be required by an officer where the performance of the duty is obligatory. *Dudley v. Butler*, 10 N. H. 281.

<sup>5</sup> *Marshall v. Balt. & O. R. R. Co.*, 16 How. 314; *Triss v. Child*, 21

§ 300. **Sales of public office and private recommendations.** — For the same reasons, the sale of a public office, or of a share in its emoluments, is held to be illegal, as tending to prejudice the public interests.<sup>1</sup> But it has been held in Vermont that certain offices were under a statute made salable.<sup>2</sup>

On the same general grounds of public policy, a contract for the sale of a recommendation of a private contract is illegal, and no recovery can be had on it.<sup>3</sup>

§ 301. **Wagers.** — At common law, wagers were not necessarily illegal, and those which were held to be legal would be a sufficient consideration for a contract.<sup>4</sup> If the subject-matter of the wager was harmless and did not in any manner offend public policy, it was legal.<sup>5</sup> But if the wager has reference to the happening or doing of some act which is illegal or against good morals, the

Wall. 441; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 261; *Clippinger v. Hepbaugh*, 5 Watts & S. 315.

<sup>1</sup> *Spencer v. Jones*, 6 Gray, 502; *Ferris v. Adams*, 28 Vt. 136; *Filson v. Hines*, 5 Pa. St. 452; *Eddy v. Capron*, 4 R. I. 394; *Gray v. Hook*, 4 N. Y. 449; *Hunter v. Nolf*, 71 Pa. St. 282; *Onton v. Rodes*, 3 A. K. Marsh. 432; *Ham v. Smith*, 87 Pa. St. 63; *Bowess v. Bowess*, 26 Pa. St. 74; *Cunningham v. Cunningham*, 18 B. Mon. 24; *Meredith v. Ladd*, 2 N. H. 518; *Hager v. Catlin*, 18 Hun, 448; *Davison v. Seymour*, 1 Bosw. 88.

<sup>2</sup> See *Thetford v. Hubbard*, 22 Vt. 440.

<sup>3</sup> *Holcomb v. Weaver*, 136 Mass. 265; *Bollman v. Loomis*, 41 Conn. 531; *Wyburd v. Stanton*, 4 Esp. 179.

<sup>4</sup> *Daniel's Negot. Inst.* 196; *Randolph Commercial Paper*, § 510; *Good v. Elliott*, 3 T. R. 693; *Da Costa v. Jones*, Cowp. 734. See *Tiedeman's Limitations of Police Power*, § 99.

<sup>5</sup> Thus it was lawful to bet that A. has purchased a wagon of B., *Good v. Elliott*, 3 T. R. 693; or to bet on a cricket match or on any other lawful race, *Walpole v. Saunders*, 16 E. C. L. R. 276; *Crump v. Secrest*, 9 Tex. 260; *McAlester v. Haden*, 2 Campb. 438. See also, generally, in support of this doctrine, *Sherborne v. Colebach*, 2 Vent. 175; *Hussey v. Crickell*, 3 Campb. 168; *Grant v. Hamilton*, 3 M. L. 100; *Cousins v. Mantes*, 3 Taunt. 515; *Johnson v. Lousley*, 12 C. B. 468; *Dalby v. India Life Ins. Co.*, 15 C. B. 365; *Bampden v. Walsh*, L. R. 12 P. D. 192.

wager is void and will not be enforced.<sup>1</sup> In no part of the civilized world are contracts for the insurance of life or property against accidental destruction held to be invalid.

The English doctrine is clearly sustained, as a part of the common law, by the decision of some of the American courts.<sup>2</sup> But, except in the matter of insurance contracts, all wager contracts are declared to be invalid in Main, Massachusetts, New Hampshire, Vermont and Pennsylvania.<sup>3</sup> In many of the States and in England the common law is changed by statutes which prohibit all wager contracts.<sup>4</sup>

<sup>1</sup> Thus wagers are void, which rest upon the result of an illegal game, *Brown v. Leeson*, 2 H. Bl. 48; *Hunt v. Bell*, 7 J. B. Moore, 212; *Egerton v. Furzman*, Ry. & Mo. 218; *Squires v. Whisken*, 8 Campb. 140; which involve the abstinence from marriage, *Huntley v. Rice*, 10 East, 22; which refer to the expected birth of an illegitimate child, *Ditchburn v. Goldsmith*, 4 Campb. 152; to the sex of a person, and the commission of adultery, *Da Costa v. Jones*, Cowp. 729; wagers on the result of public elections, *Beeley v. Wingfield*, 11 East, 46; *Rust v. Gott*, 9 Cow. 169; *Denny v. Elkins*, 4 Cranch C. C. 161; *Brush v. Keeler*, 5 Wend. 250; *Pilkinton v. Green*, 2 B. & P. 151; *Lockhart v. Hullinger*, 2 Bradw. 465; *Gordon v. Casey*, 28 Ill. 70; *Guyman v. Burlingame*, 36 Ill. 201; *Gregory v. King*, 58 Ill. 169; on the result of a war, *Lacaussade v. White*, 7 T. R. 535; *Allen v. Hearne*, 1 T. R. 57; or of a criminal prosecution, *Evans v. Jones*, 5 M. & W. 77; and so, likewise, wagers of all kinds which have an injurious effect upon the feelings or interests of a third person, *Da Costa v. Jones*, Cowp. 729; *Eastbrook v. Scott*, 3 Ves. 456; *Eltham v. Kingsham*, 1 B. & Ald. 633; *Harvey v. Gibbons*, 2 Lev. 161; *Gilbert v. Sykes*, 16 East, 150.

<sup>2</sup> *Bunn v. Rikes*, 4 Johns. 426; *Campbell v. Richardson*, 10 Johns. 406; *Deweese v. Miller*, 5 Harr. 347; *Trenton Ins. Co. v. Johnson*, 4 Zab. 576; *Dunman v. Strother*, 1 Tex. 89; *Wheeler v. Friend*, 22 Tex. 683; *Monroe v. Smelley*, 25 Tex. 586; *Grant v. Hamilton*, 3 McLean, 100 (U. S. C. C.); *Smith v. Smith*, 21 Ill. 244; *Richardson v. Kelley*, 85 Ill. 491; *Petillon v. Hipple*, 90 Ill. 420; *Carrier v. Brannan*, 8 Cal. 323; *Johnson v. Hall*, 6 Cal. 359; *Johnson v. Russell*, 37 Cal. 670.

<sup>3</sup> See *Lewis v. Littlefield*, 15 Me. 233; *McDonough v. Webster*, 68 Me. 530; *Gilmore v. Woodcock*, 69 Me. 118; *Babcock v. Thompson*, 3 Pick. 446; *Ball v. Gilbert*, 12 Met. 399; *Sampson v. Shaw*, 101 Mass. 150; *Perkins v. Eaton*, 3 N. H. 152; *Clark v. Gibson*, 12 N. H. 386; *Winchester v. Nutter*, 52 N. H. 507; *Collamer v. Day*, 2 Vt. 144; *Tarleton v. Baker*, 18 Vt. 9; *Phillips v. Ives*, 1 Rawle, 36; *Brua's Appeal*, 55 Pa. St. 294.

<sup>4</sup> Such statutes are to be found in Vermont; New York, New Jersey,



Inasmuch as insurance contracts serve a useful purpose, they are excepted from the operation of these statutes, either expressly, or by judicial construction. But in order that they be valid contracts, insurance policies must be taken out by some one bearing a lawful interest in the property or life that is insured. A policy taken out by one having no such interest, is an illegal wager, and therefore void.<sup>1</sup>

Like every other illegal transaction, the courts will have nothing to do with the subject-matter of a wager contract, unless, as a penalty, the statute provides for an action to compel a return of the money won and paid on a wager contract. A stakeholder can do what he pleases with the stakes, and no action will be entertained against him.<sup>2</sup> The only person who can maintain an action for the stakes or money paid on a bet, is the creditor of the person who paid it, and he only, when his debtor is insolvent.<sup>3</sup>

§ 302. Option sales, when illegal.<sup>4</sup> — For many years, in all parts of the world, a species of commercial gambling has been devised and developed, and which is still increasing in proportions. Large bodies of men in our commercial centers congregate daily in the exchanges for the purpose of betting on the rise and fall in the price of stocks, cotton and produce of all kinds, and lately, also, of real estate. The business is disguised under the name of speculation, but it is in nothing different from the wager on the result of some game of cards. The card player bets that

Tennessee, New Hampshire, Virginia, West Virginia, Wisconsin, Missouri, Illinois, Ohio, Iowa, and probably in other States.

<sup>1</sup> Byles on Bills, 144; *Nantes v. Thompson*, 2 East, 285; *Kent v. Bird*, Cowp. 583; *Roebuck v. Hamerton*, Cowp. 737; *Halford v. Rymer*, 10 B. & C. 724; *Morgan v. Pebrer*, 4 Scott, 280.

<sup>2</sup> *Rust v. Gott*, 3 Cow. 169.

<sup>3</sup> *Clark v. Gibson*, 12 N. H. 386.

<sup>4</sup> See Tiedeman's Police Power, § 99a, for a general discussion of these contracts from the standpoint of constitutional law.

he will win the game. The merchant, dealing in "futures," bets that the price of a commodity will, at a future day, be a certain sum, more or less than the ruling market price. In neither case does the result add anything to the world's wealth; there is only an exchange of the ownership of property without any corresponding benefit to the former owner.

But in this class of cases, it is difficult to discover the wrongful element in the prohibited transactions, and in distinguishing them from legitimate trading. The so-called "option contracts" are in form contracts for the sale or purchase of commercial commodities for future delivery, at a certain price, with the option to one or both of the parties in settlement of the contract to pay the difference between the contract price and the price ruling on the day of delivery, the difference to be paid to the seller, if the market price is lower than the contract price, and to the purchaser, if the market price is higher. Such a contract has three striking elements: First, it is a contract for future delivery; secondly, the delivery is conditional upon the will of one or both of the parties; and thirdly, the payment of differences in prices, in the event that the right of refusal is exercised by either party. If the common-law offense of *regrating* were still recognized in the criminal law, all contracts for future delivery may be open to serious objection.<sup>1</sup> But that doctrine of the common law is repudiated, and it may now be considered as definitely settled that a contract for future delivery of goods is not for that reason void. If they infringe the law, it must be for some other reason than that the contract stipulates for a future delivery. This is not only true when the vendor has the goods in his possession at the time of sale, but also when he expects to buy them for future delivery. Lord Tenterden claimed that in the latter case the contract was a

<sup>1</sup> See Tiedeman's *Police Power*, § 95.

wager on the future price of the commodity, and for that reason should not be enforced.<sup>1</sup> But the position here taken has since been repudiated by the English courts, on the ground that it is not a wager, and if a wager, not one which tends to injure the public.<sup>2</sup> The latter opinion is generally followed in the United States, and it may be stated, as the American rule, that *bona fide* contracts for future delivery of goods are not invalid, because at the time of sale the vendor has not in his actual or potential possession the goods which he has agreed to sell.<sup>3</sup>

<sup>1</sup> "I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving by assignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action on such contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences." Lord Tenterden in *Bryan v. Lewis*, Reg. & Moody, 385c. See also *Longmer v. Smith*, 1 B. & C. 1.

<sup>2</sup> "I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in *Bryan v. Lewis*. It excited a good deal of surprise in my mind at the time, and when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for a sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties know that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties." Baron Parke in *Hibblewhite v. McMorine*, 5 M. & W. 58. See *Mortimer v. McCallan*, 6 M. & W. 58; *Wells v. Porter*, 3 Scott, 141.

<sup>3</sup> *Head v. Goodwin*, 37 Me. 181; *Rumsey v. Berry*, 65 Me. 570; *Lewis v. Lyman*, 22 Pick. 437; *Thrall v. Hill*, 110 Mass. 328; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Smith v. Atkins*, 18 Vt. 461; *Noyes v. Spaulding*, 27 Vt. 420; *Hull v. Hull*, 48 Conn. 250; *Hauton v. Small*, 3 Sandf. 230; *Currie v. White*, 45 N. Y. 822; *Bigelow v. Benedict*, 70 N. Y. 202; *Bina's Appeal*, 55 Pa. St. 294; *Brown v. Speyer*, 20 Gratt. 309; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Noyes v. Jenkins*, 55 Ga. 586; *Townville v. Casey*, 1 Murphy, 389; *Whitehead v. Root*, 2 Met. (Ky.) 584; *McCarty v. Blevins*, 13 Tenn. 195; *Wilson v. Wilson*, 87 Mo. 1; *Logan v. Musick*, 81 Ill. 415; *Pixley v. Boynton*, 79 Ill. 351; *Pickering v. Case*, 79 Ill. 329;

It is also held to be an objectionable feature in such contracts, that the vendee has no expectation of receiving the goods purchased into his actual possession, but intends to resell them before the delivery of the possession to him.<sup>1</sup> To quote the words of the Kentucky court, "sales for future delivery have long been regarded and held to be indispensable to modern commerce, and as long as they continue to be held valid, one who buys for future delivery has as much right to sell as any other person, and there cannot, in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade, and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay the contract price."<sup>2</sup> Nor is a contract necessarily hurtful to the public welfare, which provides on payment of a valuable consideration that one at a future day shall have the right to buy certain property or sell other property, according as one or the other happens to be advantageous to him. One may have a lawful and beneficial end in view in acquiring such a right of refusal.<sup>3</sup> "Mercantile contracts of this character are not infrequent, and they are consistent with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to delivery, and there-

Lyon v. Culbertson, 83 Ill. 83; Corbett v. Underwood, 83 Ill. 324; Sanborn v. Benedict, 78 Ill. 309; Wolcott v. Heath, 78 Ill. 438.

<sup>1</sup> Ashton v. Dakin, 4 H. & N. 367; Sawyer, Wallace & Co. v. Daggert, 14 Bush, 730; Cameron v. Durkheim, 55 N. Y. 426. But see, *contra*, Brua's Appeal, 55 Pa. St. 294; Fareira v. Gabell, 89 Pa. St. 89; North v. Phillips, 89 Pa. St. 250.

<sup>2</sup> Sawyer et al. v. Taggart, 14 Bush, 730.

<sup>3</sup> Story v. Solomon, 71 N. Y. 420; Kingsbury v. Kirwan, 71 N. Y. 612; Harris v. Lumbridge, 83 N. Y. 92; Bigelow v. Benedict, 70 N. Y. 202.

fore bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver; and the purchaser may, in the same way, guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods, there is no inherent vice in such a contract."<sup>1</sup> And the consideration for this option may very properly be the difference between the ruling market price and the price specified in the contract. For that would be the damage to the other party resulting from the sale of the option or refusal.<sup>2</sup>

If each of the preceding propositions is correct, then the illegality of option contracts must depend upon the intention of the parties not to deliver the goods bargained for, but merely to pay the difference between the market price and contract price. The cases are unanimous in the opinion that a contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid.<sup>3</sup> If the contracts

<sup>1</sup> *Bigelow v. Benedict*, 70 N. Y. 202. In this case, A., for a valuable consideration, agreed to purchase gold coin of B. at a named price, the coin to be delivered at any time within six months that B. might choose. This case, as a legitimate transaction, is more easily understood than where the option is to buy certain goods or to sell others, but the latter can exist under lawful circumstances, and have a lawful end in view. See *Story v. Solomon*, 71 N. Y. 420.

<sup>2</sup> *Story v. Solomon* 71 N. Y. 420; *Harris v. Lumbridge*, 83 N. Y. 92, and the cases cited in the next note.

<sup>3</sup> *Rumsey v. Berry*, 65 Me. 574; *Wyman v. Fisk*, 3 Allen, 238; *Brigham v. Meade*, 10 Allen, 246; *Barratt v. Hyde*, 7 Gray, 160; *Brown v. Phelps*, 108 Mass. 308; *Hatch v. Douglass*, 48 Conn. 116; *Noyes v. Spaulding*, 27 Vt. 240; *Story v. Solomon*, 71 N. Y. 420; *Bigelow v. Benedict*, 70 N. Y. 202; *Harris v. Lumbridge*, 83 N. Y. 92; *North v. Phillips*, 89 Pa. St. 250; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Dickson's Exr. v. Thomas*, 97 Pa. St. 278; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Brown v. Speyer*, 20 Gratt. 296; *Williams v. Carr*, 80 N. C. 294; *Williams v. Tiedemann*, 6 Mo. App. 269; *Lyon v. Culbertson*, 83 Ill. 33; *Cole v. Milmine*, 88 Ill. 349; *Corbitt v. Underwood*, 83 Ill. 324; *Pickering v. Cease*, 79 Ill. 338;

were in form, as well as in fact, agreements to pay the differences in price, they could be easily avoided and thrown out of court. But the contracts never assume the form of wagers on the price of the commodity. They are almost always undistinguishable from those option contracts, in which the parties in good faith have bargained for the refusal of the goods, and which are valid contracts.<sup>1</sup> There is no evidence on the face of the contract of the determination of the parties to settle on the differences in price; and while such a contract may be used as a cover for commercial gambling, it is not necessarily a wager on the future price of the commodity. It is the ordinary rule of law that where a writing is susceptible of two constructions, one of which is legal and the other illegal, that construction will prevail, which is in conformity with the law.<sup>2</sup> Applying this rule to the construction of option contracts, it has very generally been held that these contracts are valid and enforceable, unless it be proven affirmatively that the parties did not intend to make a delivery of the goods bargained for, but to settle on the differences.<sup>3</sup> And if it be

*Pixley v. Boynton*, 79 Ill. 351; *Barnard v. Backhouse*, 52 Wis. 598; *Sawyer v. Taggart*, 14 Bush, 727; *Gregory, v. Wendall*, 39 Mich. 337; *Shaw v. Clark*, 49 Mich. 284; *Gregory v. Wattoma*, 58 Iowa, 711; *Everingham v. Meighan*, 55 Wis. 354; *Rudolph v. Winters*, 7 Neb. 125.

<sup>1</sup> The following is a good illustration of the ambiguity of the contract: "For value received, the bearer (S.) may call on the undersigned for one hundred (100) shares of the capital stock of the Western Union Telegraph Company, at seventy-seven and one-half (77½) per cent. at any time in thirty days from date. Or the bearer may, at his option, deliver the same to the undersigned at seventy-seven and one-half (77½) per cent., at any time within the period named, one day's notice required." *Story v. Solomon*, 71 N. Y. 420.

<sup>2</sup> "It is a general rule, that wheresoever the words of a deed, or of the parties without deed may have a double intendment and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken." *Coke on Lyt.* 42, 183.

<sup>3</sup> *Story v. Solomon*, 71 N. Y. 420; *Kingsbury v. Kirwan*, 71 N. Y. 612; *Harris v. Lumbridge*, 83 N. Y. 92; *Williams v. Tiedemann*, 6 Mo. App.

shown that only one of the parties entertained this illegal intention, while the other acted in good faith, the contract will be void as to the first, but will be enforceable in behalf of the second.<sup>1</sup> This rule of construction is adopted by most of the courts, in determining the legality of these questionable contracts, but a different rule has been adopted in Wisconsin. The contract which constituted the subject of the suit, was in form a legitimate transaction, and there was no proof that it was used as a cover for commercial gambling. The court declared it to be the duty of the plaintiff to show that he had made a *bona fide* contract for the delivery of the commodities bought and sold, instead of throwing upon the defendant the burden of proving that the contract was made for the payment of differences in price, and did not contemplate any delivery of the grain.<sup>2</sup>

274; *Union Nat. Bank v. Carr*, 15 Fed. Rep. 438, and cases cited in preceding notes. In delivering the opinion of the court, in *Story v. Solomon*, *supra*, Earl, J., said: "On the face of the contract the plaintiff provided for the contingency that on that day he might desire to purchase the stock, or he might desire to sell it, and in either case there would have to be a delivery of the stock, or payment in damages in lieu thereof. We should not infer an illegal intent unless obliged to. Such a transaction, unless intended as a mere cover for a bet or wager on the future price of the stock, is legitimate and condemned by no statute, and that it was so intended was not proved. If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal."

<sup>1</sup> *Rumsey v. Berry*, 65 Me. 570; *Williams v. Carr*, 80 N. C. 94; *Sawyer et al. v. Taggart*, 14 Bush, 727; *Gregory v. Wendall*, 39 Mich, 337.

<sup>2</sup> The court claimed that it would "not do to attach too much weight or importance to the mere form of the contract, for it is quite certain that the parties will be astute in concealing their intention, as well as the real nature of the transaction, if it be illegal. It may be safely assumed, that the parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind, or outside of, the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* purchase and sale of the property, or was only colorable. And to justify a

§ 303. **Contracts in restraint of trade.**—Ever since the earliest days of English national life, contracts, having the object to restrain trade and commerce, have been declared to be illegal and void. The most common form these contracts took was that of an agreement not to engage in a particular calling or trade. At an early day, it was held that all such agreements of every kind and degree were illegal. But since the rule originated as a consequence of the stringent regulations of the law relating to apprenticeship,—by which it was impossible for any one to ply a trade without having served a seven years' apprenticeship,—and these regulations were more and more relaxed, until they were completely abrogated in most of the United States, the rule prohibiting all contracts which tended to restrain trade was reduced to a prohibition of all contracts which restrained the obligor from carrying on the trade anywhere, while it became lawful to make contracts which prohibited the prosecution of a trade or calling in some particular manner.<sup>1</sup> The limitations upon the restraint of

court in upholding such an agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, or as a cover for a gambling transaction." *Barnard v. Backhouse*, 52 Wis. 593. See, to the same effect, *Cobb v. Prell*, 15 Fed. Rep. 774.

<sup>1</sup> In *Alger v. Thacher*, 19 Pick. 51, the leading case on the subject in this country, Judge Morton, delivering the opinion of the court, said: "Among the most ancient rules of the common law, we find it laid down that bonds of restraint of trade are void. As early as the second year of Henry V. (A. D. 1415), we find by the year books that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned till the present time. It is true the general rule has, from time to time, been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged without exceptions. Then an attempt was made to qualify it, by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a *general* and a *limited* restraint of trade, which



trade which would make such restraint lawful may be in respect to the space, within which the business may not be carried on; <sup>1</sup> but the authorities do not agree how restricted or extensive these limitations may be, in order that the restraint may be lawful.<sup>2</sup> But, in any case, in order to be legal, the limitations expressed to be imposed upon the operation of the contract in restraint of trade must be made in good faith, and not merely for the purpose of

has been adhered to down to the present day. This qualification of the general rule may be found as early as the eighteenth year of James I. (A. D. 1621), *Broad v. Jollyfe*, Cro. Jac. 596, where it was holden, that a contract not to use a certain trade in a particular place was an exception to the general rule and not void. And in the great and leading case on this subject, *Mitchell v. Reynolds*, reported in Lucas, 27, 85, 180, Fortescue, 296, and 1 P. Wms. 181, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void; while those limited as to time, or place or persons, have been regarded as valid, and duly enforced. Whether these exceptions to the general rule were wise, and have really improved it, some may doubt; but it has been too long settled to be called in question by a lawyer. See also *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, 21 Wend. 166; *Jarvis v. Peck*, 1 Hoff. Ch. 479; *Bowser v. Blitz*, 7 Blackf. 344; *Grasselli v. Lowden*, 11 Ohio St. 349.

<sup>1</sup> *Nobles v. Bates*, 7 Cow. 307; *Kinsman v. Parkhurst*, 18 How. 389; *Metz v. Mott*, 11 Barb. 127; *Hulock v. Blacklowe*, 2 Saund. 156, n. 1; *Van Marter v. Babcock*, 23 Barb. 633; *Davis v. Mason*, 5 T. R. 118; *Ward v. Byrne*, 4 M. & W. 548; *Lawrence v. Kidder*, 10 Barb. 641; *Mitchell v. Reynolds*, 1 P. Wms. 190; *Beard v. Dennis*, 6 Ind. 200; *Homer v. Ashford*, 3 Bing. 323; *Horner v. Graves*, 7 Bing. 735; *Bunn v. Guy*, 4 East, 190.

<sup>2</sup> In *Stearns v. Barrett*, 1 Pick. 443, it was held lawful to make an agreement not to use certain machines in any of the United States, except two (Massachusetts and Rhode Island). See *Dean v. Emerson*, 102 Mass. 480; *Thomas v. Miles*, 3 Ohio St. 274. So, also, not to follow a trade or calling in, or within a certain distance (six, ten and twelve miles) of, a town. *Smalley v. Greene*, 52 Iowa, 241; *Linn v. Sigsbee*, 67 Ill. 75; *Cook v. Johnson*, 47 Conn. 175; *McClurg's Appeal*, 57 Pa. St. 51. On the other hand it has been held to be illegal to make a contract not to carry on a calling within the limits of a State. *Taylor v. Blanchard*, 18 Allen, 370; *Wright v. Rider*, 36 Cal. 342. But see, *contra*, *Beal v. Chase*, 31 Mich. 490.

evading the law.<sup>1</sup> The limit may also be in respect to the persons, with whom the business is to be carried on; in other words the agreement may be not to do business with certain customers,<sup>2</sup> or not to conduct the business in a certain manner, subject to or against certain trade regulations.<sup>3</sup>

Following the reason of the rule, which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities and services. All combinations of capitalists and of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal, that agreements to combine cannot be enforced in the courts, and constitute insufficient considerations for the commercial obligations that may be given in payment of penalties.<sup>4</sup>

§ 304. **Maintenance and champerty.** — Maintenance and champerty are offenses at common law, and consist of intermeddling in another's lawsuits, stirring up strife, and advancing the means, in the form of money or of services, for prosecuting the suit. Agreements for remuneration for such loans or services are void and cannot be enforced, wherever the common law has not been changed by statute.<sup>5</sup>

<sup>1</sup> See *Jones v. Lees*, 1 H. & N. 189; *Dunlop v. Gregory*, 10 N. Y. 241.

<sup>2</sup> *Mitchell v. Reynolds*, 1 P. Wms. 190; *Tallis v. Tallis*, 1 El. & Bl. 391; *Pemberton v. Vaughn*, 12 Q. B. 87; *Sainter v. Ferguson*, 7 C. B. 716; *Mallan v. May*, 11 M. & W. 653; *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 M. & W. 346; *Davis v. Mason*, 5 T. R. 118.

<sup>3</sup> *Gross v. La Page*, Holt, 105; *Lightfoot v. Tenant*, 1 Bos. & P. 552.

<sup>4</sup> *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Stanton v. Allen*, 5 Denio, 434; *Brisbane v. Adams*, 3 N. Y. 129; *Noyes v. Day*, 14 Vt. 384; *Doolin v. Ward*, 6 Johns. 194; *Thompson v. Davies*, 13 Johns. 112.

<sup>5</sup> *Master v. Miller*, 4 T. R. 340; *Flight v. Leman*, 4 Q. B. 883; *Bell v. Smith*, 5 B. & C. 188; *Williamson v. Hanley*, 6 Bing. 299; *Stanley v. Jones*, 7 Bing. 369; *Alexander v. Polk*, 39 Miss. 737; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Martin v. Voeder*, 20 Wis. 466; *Byrd v. Odem*, 9 Ala. 755; *Holloway v. Lowe*, 7 Porter, 488;

§ 305. **Offenses against morality and religion.** — Commercial paper, given as a compensation for the commission of offenses against morality and religion, is illegal and of no force, as between the parties.<sup>1</sup> Thus, a note has been held to be void, which was given as compensation for libeling another or selling libelous books;<sup>2</sup> for future illicit cohabitation,<sup>3</sup> or for renting lodgings for purposes of prostitution.<sup>4</sup>

§ 306. **Sales in violation of statutes.** — A sale is illegal, whether the statute expressly declares it to be so, or prohibits its execution or merely imposes a penalty upon the parties for making it.<sup>5</sup> But the sale itself will not be illegal, if the statute simply prohibits “offering for sale” or “exposing for sale” certain goods; for a lawful sale might in that case be made privately.<sup>6</sup> So, also, is a sale not illegal because it is made by one who has not paid his license tax to carry on his business in accordance with the

*Satterlee v. Frazer*, 2 Sandf. 141; *Rush v. Laru*, 4 Litt. 417; *Coughlin v. N. Y., &c., R. Co.*, 71 N. Y. 443; *Martin v. Clarke*, 8 R. I. 389; *Orr v. Tanner*, 12 R. I. 94; *Quigley v. Thompson*, 58 Ind. 317; *Thompson v. Reynolds*, 73 Ill. 11; *Allard v. Lamiraude*, 29 Wis. 502. See *Schomp v. Schenck*, 11 Vroom, 195.

<sup>1</sup> 1 Parsons, 214; 1 Daniel, 197; *Jackson v. Duchaire*, 3 T. R. 551.

<sup>2</sup> 1 Daniel, 197; *Stockdale v. Onwhyn*, 5 B. & C. 173; *Fores v. Johnes*, 4 Esp. 97.

<sup>3</sup> 1 Parsons, 214; 1 Daniel, 194. But it is held that a note will be good which has been given for a past offense of that kind. *Ex parte Munford*, 15 Ves. 289; *Gibson v. Dickie*, 3 M. & S. 463; *Marchioness of Annandale v. Harris*, 2 P. Wms. 432; *Turner v. Vaughan*, 2 Wils. 339; *Smith v. Richards*, 29 Conn. 232; *Brown v. Kinsey*, 81 N. C. 245; *Shenk v. Mingle*, 13 Serg. & R. 29.

<sup>4</sup> *Jennings v. Throgmorton, Ry. & M.* 251; *Girardy v. Richardson*, 1 Esp. 13.

<sup>5</sup> *Bancroft v. Dumas*, 21 Vt. 456; *Mitchell v. Smith*, 1 Binn. 110; *Miller v. Post*, 1 Allen, 435; *Griffith v. Wells*, 3 Denio, 227; *Barton v. Port Jackson, &c., Ice Co.*, 17 Barb. 404; *Buxton v. Hamblen*, 32 Me. 348; *Woods v. Armstrong*, 54 Ala. 150; *Roby v. West*, 4 N. H. 285.

<sup>6</sup> *Williams v. Tappan*, 23 N. H. 385; *Brackett v. Hoyt*, 29 N. H. 264; *Jones v. Berry*, 33 N. H. 209; *Eberle v. Mehrbach*, 55 N. Y. 682.

requirement of the license law.<sup>1</sup> But where the license is imposed, not as a tax but as a police regulation, and the prosecution of the business is positively prohibited, it is probable that a sale made by one who has no such license will be void.<sup>2</sup>

It would be impossible to mention all the sales which have been made illegal by statute, but a few of them are given as illustrations in the note below.<sup>3</sup>

§ 307. **Sales of smuggled goods.** — A contract is also illegal, which provides for the sale and smuggling of goods into the country in violation of its revenue laws.<sup>4</sup>

<sup>1</sup> See *Alken v. Blaisdell*, 41 Vt. 655; *Smith v. Manhood*, 14 M. & W. 452; *Rahter v. First Nat. Bank*, 92 Pa. St. 398; *Harris v. Runnels*, 12 How. 79; *Vining v. Bricker*, 14 Ohio St. 331; *Lindsey v. Rutherford*, 17 B. Mon. 245; *Mandlebaum v. Gregovich*, 17 Nev. 87; *Corning v. Abbott*, 54 N. H. 469; *Larned v. Andrews*, 106 Mass. 435. But see *Curran v. Downs*, 3 Mo. App. 468; *Creekmore v. Chitwood*, 7 Bush, 317; *Swords v. Owen*, 43 How. Pr. 176; *Best v. Bander*, 29 How. Pr. 489.

<sup>2</sup> For the distinction between the license as a police regulation, and the license as a tax, see *Tiedeman's Limitations of Police Power*, § 101.

<sup>3</sup> The sale of unmeasured wood, *Pray v. Burbank*, 10 N. H. 377; coal without being weighed, *Ribby v. Downey*, 5 Allen, 299; unculled hoops, *Durgin v. Dyer*, 68 Me. 143; sales by unsealed weights and measures, *Milner v. Post*, 1 Allen, 134; *Smith v. Arnold*, 106 Mass. 269; *Sawyer v. Smith*, 109 Mass. 220; *Palmer v. Kelleher*, 111 Mass. 320; sales of refreshments to voters on election day, *Duke v. Asbee*, 11 Ired. 112; sale of grain by the bag instead of by the bushel, *Eaton v. Keagon*, 114 Mass. 493; of bread by the loaf, instead of by the pound, *Johnson v. Kalb*, 8 W. N. C. (Pa.) 273; sales by unlicensed peddlers, *Bull v. Harrigan*, 17 B. Mon. 349; *Duffy v. Gorman*, 10 Cush. 45; sale of shingles under statutory measurements, *Wheeler v. Russell*, 17 Mass. 258; sale of uninspected or unbranded fertilizers, *Conley v. Sims*, 71 Ga. 161; *Woods v. Armstrong*, 54 Ala. 150; sale of unsurveyed lumber, *Richmond v. Foss*, 77 Me. 590. But see *Abbott v. Goodwin*, 37 Me. 208; *Rogers v. Humphreys*, 39 Me. 302. For a discussion of the constitutionality of regulations like these, see *Tiedeman's Limitations of Police Power*, § 89.

<sup>4</sup> *Pellecat v. Angell*, 2 Crompt. M. & R. 311; *Creekmore v. Chitwood*, 7 Bush, 317; *Story on Sales*, §§ 507, 508.

§ 308. **Sunday sales.**<sup>1</sup> — Independently of statute, it is not unlawful to make contracts and sales and transact other business on Sunday;<sup>2</sup> but in most of the States, if not in all, as well as in England, there are statutes which make it illegal to transact business on that day,<sup>3</sup> excepting works of charity. But public sentiment does not now support this law so strongly as it once did, and under the influence of a lax and indifferent, if not hostile, public opinion, the prohibition of sales on Sunday is very liberally construed. If the sale is made and fully executed on Sunday, it is illegal and neither party can be restored to his original condition. Neither can the seller compel the buyer to perform his part of the contract by paying the price, nor can the buyer hold the seller liable on his warranty. The law will leave the parties in the condition in which it finds them.<sup>4</sup> But if the contract of sale alone is made on

<sup>1</sup> See Tiedeman's *Limitations of Police Power*, § 76, for a discussion of the constitutionality of the Sunday Laws.

<sup>2</sup> *Bloom v. Richards*, 2 Ohio St. 387; *Moore v. Murdock*, 26 Cal. 526; *Johnson v. Brown*, 18 Kan. 529; *Kaufman v. Hamm*, 80 Mo. 387; *Batsford v. Every*, 44 Barb. 616; *O'Rourke v. O'Rourke*, 48 Mich. 58; *Horace v. Keebler*, 5 Neb. 358; *Eberle v. Mehrbach*, 55 N. Y. 682; *Merritt v. Earle*, 29 N. Y. 120.

<sup>3</sup> See *Drury v. Defontaine*, 1 Taunt. 181; *Bloxsome v. Williams*, 6 Barn. & C. 232; *Smith v. Beane*, 15 N. H. 577; *Allen v. Gardiner*, 7 R. I. 22; *Murphy v. Simpson*, 14 B. Mon. 419; *Mueller v. State*, 76 Ind. 310; *Finley v. Quirk*, 9 Minn. 194; *Sayre v. Wheeler*, 32 Iowa, 559; *Pate v. Wright*, 30 Ind. 476; *Northrup v. Foote*, 14 Wend. 248; *Cranson v. Goss*, 107 Mass. 439; *Lyon v. Strong*, 6 Vt. 219.

<sup>4</sup> *Horton v. Buffington*, 105 Mass. 399; *Cranson v. Goss*, 107 Mass. 441; *Block v. McMurray*, 56 Miss. 217; *Greene v. Godfrey*, 44 Me. 25; *Ellis v. Hammond*, 57 Ga. 179; *Chestnut v. Harbaugh*, 78 Pa. St. 473; *Shuman v. Shuman*, 27 Pa. St. 90; *Moore v. Murdock*, 26 Cal. 574; *Myers v. Meinrath*, 101 Mass. 366; *King v. Green*, 6 Allen, 139; *Kinney v. McDermot*, 55 Iowa, 674; *Johnson v. Willis*, 7 Gray, 164; *Gunderson v. Richardson*, 56 Iowa, 56; *Murphy v. Thompson*, 14 B. Mon. 419; *Finley v. Quick*, 9 Minn. 194; *Howard v. Harris*, 8 Allen, 297; *Plaisted v. Palmer*, 63 Me. 576; *Cardoze v. Swift*, 113 Mass. 250; *Lyon v. Strong*, 6 Vt. 219; *Hulet v. Stratton*, 5 Cush. 539; *Northrup v. Foote*, 14 Wend. 248; *Kobeson v. French*, 12 Met. 24.

Sunday, and the goods are delivered on some other subsequent day, the sale will be valid on the ground that a new contract of sale was made when the goods were delivered.<sup>1</sup> And the sale has been held to be valid and binding, although the goods are delivered on Sunday, if a fresh promise<sup>2</sup> or a ratification of the Sunday bargain<sup>3</sup> is made on some other day. But this position does not seem to be a sound one, if it be true that an illegal sale is absolutely void instead of being merely voidable.

The statutes usually except works of charity and necessity, so that contracts for the doing of such things will be valid when made on Sunday.<sup>4</sup> And where the statute simply prohibits the prosecution of one's "ordinary calling," it will be lawful for one to sell goods on Sunday, if that is not his ordinary calling.<sup>5</sup>

§ 309. *Sale of intoxicating liquors.* — The liquor trade is now very generally subjected to police regulation, sometimes permitting its prosecution by those who have been

<sup>1</sup> *Bradley v. Rea*, 14 Allen, 20; *Dodson v. Harris*, 10 Ala. 566; *Kountz v. Price*, 40 Miss. 341; *Rosenblatt v. Townsley*, 78 Mo. 536; *Foreman v. Ahl*, 55 Pa. St. 325; *Bradley v. Rea*, 108 Mass. 188. See *Smith v. Bean*, 15 N. H. 577.

<sup>2</sup> *Winchell v. Carey*, 115 Mass. 560; *Harrison v. Colter*, 81 Iowa, 16; *Melchior v. McCarty*, 81 Wis. 252.

<sup>3</sup> *Adams v. Gay*, 19 Vt. 338; *Sayles v. Wellman*, 10 R. I. 465; *Campbell v. Young*, 9 Bush, 240; *Kuhns v. Gates*, 92 Ind. 66; *Tucker v. West*, 29 Ark. 386; *Smith v. Case*, 2 Oreg. 190. But see, *contra*, *Thompson v. Williams*, 58 N. H. 248; *Parker v. Pitts*, 78 Ind. 597; *Catlett v. Trustees*, 62 Ind. 365; *Trolwert v. Decker*, 51 Wis. 46; *Kountz v. Price*, 40 Miss. 341; *Ryno v. Darby*, 20 N. J. Eq. 281; *Reeves v. Butcher*, 81 N. J. L. 224; *Guinn v. Stimes*, 61 Mo. 335; *Vinz v. Beatty*, 61 Wis. 645; *Shippey v. Eastwood*, 9 Ala. 198; *Pope v. Linn*, 50 Me. 83; *Ladd v. Rogers*, 11 Allen, 209; *Day v. McAllister*, 15 Gray, 433.

<sup>4</sup> *Stewart v. Davis*, 31 Ark. 518; *Aldrich v. Blackstone*, 128 Mass. 148; *Philadelphia, &c., R. R. Co. v. Lehman*, 56 Md. 209, 226; *Allen v. Duffie*, 48 Mich. 1; *Dale v. Knapp*, 98 Pa. St. 389.

<sup>5</sup> *Drury v. Defontaine*, 1 Taunt. 131; *Sanders v. Johnson*, 29 Ga. 526; *Allen v. Gardiner*, 7 R. I. 22; *Mills v. Williams*, 16 S. C. 593.

licensed by the State, and sometimes partially or totally prohibiting the sale of intoxicating liquors, except for medicinal, sacramental and mechanical purposes. Although the constitutionality of these laws is very doubtful, on principle, public opinion has been so greatly influenced by the excitement of temperance agitators over the prevalent drunkenness, that it has forced a recognition of the validity of these laws, notwithstanding the violation of the fundamental principles of constitutional interpretation.<sup>1</sup> The cases are numerous in which these prohibition laws have been held to be constitutional;<sup>2</sup> and as a matter of course, where these laws have been violated in the sale of intoxicating liquors, the sale itself is illegal, and no action can be maintained thereon.<sup>3</sup>

While this is not the place for the discussion of constitutional limitations of the police power of the state, it will be well to say that the power of the state is limited to the prohibition of the sales made altogether within the state, and the state prohibition law cannot apply to interstate

<sup>1</sup> See Tiedeman's Limitations of Police Power, § 108.

<sup>2</sup> *Metropolitan Board of Excise v. Barrie*, 84 N. Y. 657; *Wyneham v. People*, 8 Kern, 485; *Warren v. Mayor, &c.*, Charleston, 2 Gray, 98; *Fisher v. McGirr*, 1 Gray, 26; *Jones v. People*, 14 Ill. 196; *Goddard v. Jacksonville*, 15 Ill. 588; *People v. Hawley*, 3 Gibbs, 330; *Preston v. Drew*, 33 Me. 559; *State v. Noyes*, 30 N. H. 279; *State v. Snow*, 3 R. I. 68; *State v. Peckham*, 3 R. I. 293; *State v. Paul*, 5 R. I. 185; *State v. Wheeler*, 25 Conn. 290; *Lincoln v. Smith*, 27 Vt. 328; *Sante v. State*, 2 Clarke (Iowa), 165; *Prohibitory Am. Cas.*, 25 Kan. 751; *Bartemeyer v. Iowa*, 18 Wall. 729; *State v. Mugler*, 29 Kan. 252; *Perdue v. Ellis*, 18 Ga. 586; *Austin v. State*, 10 Mo. 591; *State v. Searcy*, 20 Mo. 489; *Our House v. State*, 4 Greene (Iowa), 172; *Zumhoff v. State*, 4 Greene (Iowa), 526; *State v. Donehey*, 8 Iowa, 396; *State v. Carney*, 20 Iowa, 82; *State v. Baughman*, 20 Iowa, 497; *State v. Gurney*, 37 Me. 156; *State v. Burgoyne*, 7 Lea, 173; *State v. Prescott*, 27 Vt. 194; *Lincoln v. Smith*, 27 Vt. 328; *State v. Brennan's Liquors*, 25 Conn. 278; *State v. Common Pleas*, 36 N. J. 72.

<sup>3</sup> *Weid v. Golden*, 6 N. E. Rep. 229 (Mass.). See *Butter v. Northumberland*, 50 N. H. 33; *Jameson v. Gregory*, 4 Met. (Ky.) 863; *Dolson v. Hope*, 7 Kan. 161; *Yaeger Milling Co. v. Brown*, 128 Mass. 171.

commerce law.<sup>1</sup> And the Supreme Court of the United States has lately held that the state cannot prohibit the sale of goods, bought in another state, as long as the original package, in which it was imported into the state, remains unbroken. Until broken or changed in form, it remains an article of interstate commerce, and does not become a subject of domestic trade, until so changed.<sup>2</sup>

<sup>1</sup> Tiedeman's Limitations of Police Power, § 202.

<sup>2</sup> *Leisy v. Harlin* (U. S. Sup. Ct. 1890), 10 S. C. Rep. 725.



## CHAPTER XXI.

### RIGHTS OF BONA FIDE PURCHASERS.

- SECTION 310.** The general doctrine.
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  - 312. Possession how far evidence of ownership.
  - 313. Purchaser of stolen and lost goods.
  - 314. Purchaser at an illegal sale — Void judicial sales.
  - 315. Purchaser from a bankrupt or insolvent.
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  - 317. Delivery of goods to bailee for sale — Sale by factors — Factors' acts.
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  - 326. Purchaser from the mortgagee of a chattel mortgage.
  - 327. Purchaser from fraudulent vendee.
  - 328. Purchaser of vendor in fraud of creditors.
  - 329. Who are *bona fide* purchasers.

§ 310. The general doctrine. — The general principle of the law of sales is that the buyer does not get any better title than what the vendor had; and, therefore, if one undertakes to sell goods, which do not belong to him, and when he has not been authorized by their owner to sell them as his agent, the purchaser does not acquire title to the goods, although he buys them in good faith and pays full value for them.<sup>1</sup> But there are some exceptions to

<sup>1</sup> *Saltus v. Everett*, 20 Wend. 267; *Ash v. Putnam*, 1 Hill, 803; *Quinn v. Davis*, 78 Pa. St. 15; *Evansville, &c., R. R. Co. v. Erwin*, 84 Ind. 457,

this rule, which will be discussed in the succeeding pages. It may, however, be stated here that no reference will be made to the *bona fide* purchase of commercial paper, as that constitutes a distinct subject in itself. Hence what follows is not intended to refer to that class of property.

§ 311. Sales in markets overt. — According to the English law, the sale of personal property in any one of the public markets, which were once held in different parts of England, and finally any open or public sale of goods within a certain area in the city of London, was held to give to the purchaser an absolute title to the goods, notwithstanding they were not the lawful property of the vendor.<sup>1</sup> The reason for this exception to the general rule is that the publicity of the sale would enable the owner of the goods to reclaim them, if they were not the property of the vendor, and this notorious possession of the goods by the vendor supports the presumption that he had a good and perfect title to the goods. But the doctrine of the

466; *Whistler v. Foster*, 14 C. B. (N. S.) 248; *Fawcett v. Osborn*, 32 Ill. 425; *Wright v. Solomon*, 19 Cal. 64; *Barnard v. Campbell*, 55 N. Y. 460; *Leigh v. Mobile, &c., R. R. Co.*, 58 Ala. 176; *Wheelwright v. Depuyster*, 1 Johns. 471; *Gibbs v. Jones*, 46 Ill. 319; *Williams v. Merle*, 11 Wend. 80; *Cundy v. Lindsay*, L. R. 3 App. Cas. 463; *Hamet v. Letcher*, 37 Ohio St. 356; *Alexander v. Swackhamer*, 105 Ind. 81; *Ventrees v. Smith*, 10 Pet. 161, 175; *Klein v. Siebold*, 89 Ill. 540; *McCully v. Hardy*, 18 Ill. App. 681; *Mayer v. Bruton*, 1 Tex. App. § 699; *Jennings v. Gage*, 18 Ill. 610; *Parsons v. Webb*, 8 Greenl. 38; *Prime v. Cobb*, 63 Me. 200; *Courtis v. Cane*, 32 Vt. 232; *Stanley v. Gaylor*, 1 Cush. 536; *Gilmore v. Newton*, 9 Allen, 171; *Kinder v. Shaw*, 2 Mass. 398; *Moody v. Blake*, 171, Mass. 23; *Wilson v. Crocker*, 43 Mo. 218; *Whistler v. Foster*, 32 L. J. C. P. 545; *Peer v. Humphreys*, 2 Add. & E. 161; *Barrett v. Hill*, 3 Hill, 348; *Bearce v. Bowker*, 115 Mass. 129; *Chapman v. Cole*, 12 Gray, 141; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Bryant v. Whitchen*, 52 N. H. 158; *Riford v. Montgomery*, 7 Vt. 418; *Galvin v. Bacon*, 2 Fairf. 28.

<sup>1</sup> 2 Blackst. Com. 449; *Cundy v. Lindsay*, L. R. 3 App. Cas. 463; *Benjamin v. Andrews*, 5 C. B. (N. S.) 299; *Bennett's Benjamin on Sales*, § 6; *Lyons v. De Pass*, 11 Ad. & E. 326; *Crane v. London Dock Co.*, 5 Best & Smith, 318; *Lee v. Bayes*, 18 C. B. 599.

market overt has never met with any recognition in this country, and in most of the States it has been expressly repudiated.<sup>1</sup>

There has been some attempt to apply the doctrine of *market overt* to sales of chattels under execution, and the attempt has been somewhat successful in the case of judicial sales;<sup>2</sup> but the authorities in general refuse to hold that the purchaser in an involuntary sale of any kind gets any better title than what the party selling has in the property.<sup>3</sup>

§ 312. Possession how far evidence of ownership. — Possession of the goods is always *prima facie* evidence of ownership of them,<sup>4</sup> but unless the possession is accompanied by other evidences of ownership, or the facts estop the real owner from asserting his title against the purchaser, it is only *prima facie* evidence of ownership; and if it be proved, as it may be, by extraneous evidence that the goods

<sup>1</sup> *Ventress v. Smith*, 10 Pet. 161; *Williams v. Merle*, 11 Wend. 80; s. c. 25 Am. Dec. 609 note; *Coombs v. Gordon*, 59 Me. 112; *Griffith v. Fowler*, 18 Vt. 390; *Wheelwright v. Depuyster*, 1 Johns. 180; *Mowrey v. Walsh*, 8 Cow. 238; *Hosack v. Weaver*, 1 Yeates, 478; *Quinn v. Davis*, 78 Pa. St. 15; *Black v. Jones*, 64 N. C. 318; *Dawson v. Susong*, 1 Heisk. 243; *Fawcett v. Osborn*, 32 Ill. 411; *Robinson v. Skipworth*, 23 Ind. 311; *Roland v. Gundy*, 5 Ohio, 203; *Ketchum v. Brennan*, 53 Miss. 596; *Browning v. Magill*, 4 Har. & J. 308; *Hardy v. Metzgar*, 2 Yeates, 347; *Easton v. Worthington*, 5 Serg. & R. 130; *Hoffman v. Carow*, 22 Wend. 235; *Towne v. Collins*, 14 Mass. 400; *Bryant v. Whitcher*, 52 N. H. 158; *Heacock v. Walker*, 1 Tyler, 341.

<sup>2</sup> See *Samms v. Alexander*, 3 Yeates, 268; *The Monte Allegre*, 9 Wheat. 616; *Heacock v. Walker*, 1 Tyler, 341; *Forsythe v. Ellis*, 4 J. J. Marsh. 298.

<sup>3</sup> *Freeman on Executions*, § 335; *Chambers v. Lewis*, 28 N. Y. 454; *Buffam v. Deane*, 8 Cush. 41; *Stone v. Eberly*, 1 Bay, 317; *Sheanck v. Huber*, 6 Binn. 2; *Austin v. Tilden*, 14 Vt. 327; *Williams v. Miller*, 16 Conn. 144; *Bartholomew v. Warren*, 32 Conn. 202; *Homesley v. Hague*, 4 Jones, 481; *Symonds v. Hull*, 37 Me. 354; *Champney v. Smith*, 15 Gray, 212; *McClanahan v. Barrow*, 27 Minn. 664.

<sup>4</sup> *Leigh v. Mobile, &c., R. R. Co.*, 58 Ala. 165, 178; *Fawcett v. Osborn*, 32 Ill. 411.

do not belong to the vendor, the *bona fide* purchaser cannot resist the demand of the owner for a delivery to him of his property.<sup>1</sup> But if the owner of the goods clothes the vendor with all the *indicia* of title, and permits the agent to appear to the world as the real owner of the goods, he is then estopped, as against a *bona fide* purchaser, from denying that the agent, in selling, did not pass an absolute title to the goods.<sup>2</sup>

§ 313. **Purchaser of stolen and lost goods.** — The thief does not, by gaining possession, acquire any right to it as against the true owner, not even a qualified right; and since he acquires it by his own act, and against the will, or at least without the consent of the true owner, the owner has not in any sense invested him with apparent ownership, and hence a *bona fide* purchaser does not acquire from him any title which he can assert against the true owner,<sup>3</sup> not even where he buys in the best of faith, and for full value.<sup>4</sup> This is not only the case with common-law larceny, but with every sort of unlawful appropriation of the property of another, where the owner has not parted with the property or consented to the transfer of the property;<sup>5</sup> and in-

<sup>1</sup> Covill v. Hill, 4 Denio, 323; Leigh v. Mobile, &c., R. R. Co., 58 Ala. 165, 178; Andrews v. Dietrich, 14 Wend. 31; Pickering v. Busk, 15 East, 38; Saltus v. Everett, 20 Wend. 267; Barstow v. Savage Mining Co., 64 Cal. 388, 391.

<sup>2</sup> Saltus v. Everett, 20 Wend. 378; Jennings v. Gage, 18 Ill. 610; Mc-Niel v. Tenth Nat. Bank, 46 N. Y. 325; Arnold v. Johnson, 66 Cal. 402; Ambrose v. Evans, 66 Cal. 74; Barstow v. Savage Mining Co., 64 Cal. 388; Fawcett v. Osborn, 32 Ill. 411. This subject will be fully treated in a subsequent paragraph. See *post*, §§ 317, 318.

<sup>3</sup> Breckenridge v. McAfee, 54 Ind. 141; Cunday v. Lindsay, L. R. 3 App. Cas. 463; Williams v. Merle, 11 Wend. 80; 25 Am. Dec. 604, 606, note; Barstow v. Savage Mining Co., 64 Cal. 388; Parham v. Riley, 4 Cold. 9; Galvin v. Bacon, 2 Fairf. 30, 31; Hoffman v. Carow, 20 Wend. 21.

<sup>4</sup> Lee v. Bayes, 18 C. B. 599; Robinson v. Shipworth, 23 Ind. 311; Sadler v. Lewers, 42 Ark. 148; Barstow v. Savage Mining Co., 64 Cal. 388.

<sup>5</sup> Florence Sewing Machine Co. v. Warford, 1 Sweeney, 433; Malcolm

cludes not only robbery, or appropriation by force,<sup>1</sup> but also an appropriation of the property of another by mistake.<sup>2</sup> In every case, where one appropriates the property of another, without the latter's consent or co-operation, the vendor does not acquire such a title as that he may give a purchaser a perfect title against the true owner; and the owner may maintain against the purchaser any action, such as trover or replevin, as may be necessary to enable him to recover his property;<sup>3</sup> and he can do this, although the purchaser has expended labor on the property, and thereby more or less changed its character.<sup>4</sup>

The same rule holds good where the property was found, instead of having been stolen or appropriated. The finder cannot give a good title to the purchaser.<sup>5</sup>

§ 314. **Purchaser at an illegal sale under execution — Void judicial sales.** — If an officer levies upon goods not belonging to the person against whom the writ of execution was issued, and sells them, the purchaser does not get a good title, and both he and the officer are liable in trover for the conversion, while the goods may be recovered from the purchaser in an action of replevin.<sup>6</sup> And the title of

*v. Loveridge*, 13 Barb. 372; *Keyser v. Harbeck*, 8 Duer, 373; *Williams v. Given*, 6 Gratt. 268. See *Mowry v. Walsh*, 8 Cow. 238; *Andrews v. Dietrich*, 14 Wend. 34; *Breckenridge v. McAfee*, 54 Ind. 141.

<sup>1</sup> *Parnam v. Riley*, 4 Cold. 9.

<sup>2</sup> *Williams v. Merle*, 11 Wend. 80; *Chapman v. Cole*, 12 Gray, 141.

<sup>3</sup> *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Whitman Gold, &c., Mining Co. v. Trittle*, 4 Nev. 494; *Freeman v. Underwood*, 66 Me. 229; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Sharp v. Parks*, 48 Ill. 511; *Gilmore v. Newton*, 9 Allen, 171; *Barrett v. Warren*, 3 Hill, 348.

<sup>4</sup> *Strubbee v. Trustees*, 78 Ky. 431.

<sup>5</sup> *Cunday v. Lindsay*, L. R. 3 App. Cas. 463; *McAvoy v. Medena*, 11 Allen, 548; *Mann v. Ark., &c., Co.*, 24 Fed. Rep. 261; *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424. See *Sherwood v. Meadow Valley Mining Co.*, 50 Cal. 412; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Barstow v. Savage Mining Co.*, 64 Cal. 388.

<sup>6</sup> *Griffith v. Fowler*, 18 Vt. 390; *Symonds v. Hall*, 37 Me. 354, 357; *Sanborn v. Kittridge*, 20 Vt. 640; *Buffum v. Deane*, 8 Cush. 41; *Johnson*

the purchaser in an execution sale is also defective and invalid as against the debtor, where the officer has levied upon property which is exempt from levy.<sup>1</sup>

Wherever a judicial sale is based upon a void order of the court, or is conducted in violation of the instructions of the court or of the law, which prescribe certain formalities, the purchaser gets no title, as against the owner of the goods,<sup>2</sup> unless, perhaps, when the defect in the proceedings is a mere irregularity, which makes the sale voidable only, and not void.<sup>3</sup>

In sales under execution<sup>4</sup> as well as in sales in chancery and judicial sales in general,<sup>5</sup> if the order of sale or writ of execution has been issued in due form, and by the proper officer, a reversal of the judgment, upon which the order or writ rested, by the court of appeals will not disturb the title of the purchaser, unless he was a party to the suit in which the judgment had been rendered.<sup>6</sup>

*v. Babcock*, 8 Allen, 538; *Bartholomew v. Warren*, 32 Conn. 102; *Homesley v. Hogue*, 4 Jones (N. C.), 431; *Arendale v. Morgan*, 5 Sneed, 103; *Burke v. McWhirter*, 85 Up. Can. Q. B. 1; *Kirby v. Cahill*, 6 Up. Can. Q. B. (o. s.) 516; *Baggs v. Fowler*, 16 Cal. 559; *Stone v. Eberly*, 1 Bay, 317; *Sheanck v. Huber*, 6 Binn. 2; *Chapney v. Smith*, 15 Gray, 512; *Bryant v. Whitchee*, 32 N. H. 158; *Coombs v. Gorden*, 59 Me. 111.

<sup>1</sup> See *Cooper v. Newman*, 45 N. H. 339; *Williams v. Miller*, 16 Conn. 143; *Buckley v. Wheeler*, 52 Mich. 1.

<sup>2</sup> *Wells v. Raglan*, 1 Swan, 501; *Miller v. Thompson*, 60 Me. 322; *Wheelwright v. Depeyster*, 1 Johns. 471; *Harris v. Saunders*, 1 Strobb. Eq. 300.

<sup>3</sup> See *Farrant v. Thompson*, 5 Bard. & Ald. 826; *Lock v. Selwood*, 1 Q. B. 736.

<sup>4</sup> *Feger v. Keefer*, 6 Watts, 297; *Taylor v. Boyd*, 3 Ohio, 337; *Gray v. Brigmordello*, 1 Wall. 627; *Parker v. Anderson*, 5 B. Mon. 445. But see *Delano v. Wilde*, 11 Gray, 17.

<sup>5</sup> *Galpin v. Page*, 18 Wall. 350; *Jackson v. Cadwell*, 1 Cow. 641; *Taylor v. Boyd*, 3 Ohio, 337; *Gott v. Palmer*, 41 Mo. 416; *McJilton v. Love*, 13 Ill. 495; *Reynolds v. Harris*, 14 Cal. 667.

<sup>6</sup> *Stinson v. Ross*, 51 Me. 557; *Galpin v. Page*, 18 Wall. 350; *Jackson v. Cadwell*, 1 Cow. 641; *Taylor v. Boyd*, 3 Ohio, 337; *Gott v. Powell*, 41 Mo. 416; *McJilton v. Love*, 13 Ill. 495; *Reynolds v. Harris*, 14 Cal. 667.

§ 315. **Purchaser from a bankrupt, or insolvent.** — Wherever the bankrupt and insolvent laws vest the property of the bankrupt in an assignee for the creditors; or where the insolvent debtor makes a voluntary assignment for the benefit of creditors, in either case he no longer has the title to the goods, and if he should attempt thereafter to sell them, his *bona fide* purchaser would get no title, which he could assert against the assignee or against the creditors; and he will be guilty of conversion, if he takes possession of the goods.<sup>1</sup>

§ 316. **Sale by bailees in general — Sale by pledgee.** — Except in the case of goods which have been lost and found, and in which the finder becomes a bailee on taking the property found into his possession, a bailment arises out of a voluntary transfer of property by the owner to one who is charged with some duty in respect to the property delivered to him, and upon the performance of this duty, he is to return the goods to the owner, or dispose of them according to his order or direction. For this reason, it is universally held that the bailee does not acquire the absolute title to the goods bailed, only a special property therein for the purposes of the bailment. He has, therefore, in himself no absolute title which he can convey to another, which would enable the latter to hold the property against the demand of the true owner.

This is the case in every kind of bailment, especially in bailments of depositum,<sup>2</sup> commodatum, or loan,<sup>3</sup> for hire,<sup>4</sup> for transportation,<sup>5</sup> or for expenditure of work on the

<sup>1</sup> Galvin v. Bacon, 11 Me. 28; Hoare v. Parker, 2 T. R. 576; Stephens v. Elwall, 4 Maule & S. 259.

<sup>2</sup> Stanley v. Gaylord, 1 Cush. 536; Newcomb Buchanan Co. v. Baskett, 11 Bush, 658; Hartop v. Hoare, 3 Atk. 44.

<sup>3</sup> Gilmore v. Newton, 9 Allen, 171; Roland v. Gundy, 5 Ohio, 202; Heacock v. Walker, 1 Tyler, 338; Riford v. Montgomery, 7 Vt. 411.

<sup>4</sup> Sanborn v. Coleman, 6 N. H. 14; Donald v. Arnold, 28 Tex. 97.

<sup>5</sup> Saltus v. Everett, 20 Wend. 267; Linnen v. Crugger, 40 Barb. 638; Covill v. Hill, 4 Dento, 323; Hyde v. Noble, 13 N. H. 494.

property bailed.<sup>1</sup> And where the right to purchase is added to the bailment, until the right has been exercised, and the sale to him has been completed, the bailee has himself no power to sell, and can give no good title to a purchaser from him.<sup>2</sup> This is the case with contracts for the sale or return of the goods delivered, where the title remains in the vendor until the vendee exercises his right of election.<sup>3</sup>

But while there can be no doubt that the purchaser from an ordinary bailee gets no better title than what the bailee had, some doubt is felt in the case of an unauthorized sale by a pledgee, even though none may exist. The pledgee undoubtedly has the power, when the debt falls due and remains unpaid, to sell the pledge for the purpose of satisfying the debt for which the pledge had been given, after reasonable notice and, if there be statutory regulations of sales by pledgee, in compliance with these regulations.<sup>4</sup> But if the pledgee should attempt to sell the pledge, when there has been no default in the payment of the debt, as, for example, when the debt has not yet matured, the purchaser does not get an absolute title to the goods, as against the pledgor, and he will be liable in conversion for an appropriation of them to his own use.<sup>5</sup> It is the same case,

<sup>1</sup> *Buckmaster v. Mower*, 21 Vt. 204; *Wooster v. Sherwood*, 25 N. Y. 278.

<sup>2</sup> *Carter v. Wallace*, 35 Hun, 189; *Burroughs v. Bayne*, 5 Hurl. & M. 296; *Chamberlain v. Smith*, 44 Pa. St. 431; *Hart v. Carpenter*, 24 Conn. 427; *Grant v. King*, 14 Vt. 367.

<sup>3</sup> See *ante*, § 213, and *post*, § 325.

<sup>4</sup> See *Martin v. Reid*, 11 C. B. (N. S.) 730; *Pigott v. Cubley*, 15 C. B. (N. S.) 701; *Johnson v. Stear*, 15 C. B. (N. S.) 330; *Rohrle v. Stidger*, 50 Cal. 207; *Stevens v. Bell*, 6 Mass. 339; *Mowry v. Wood*, 12 Wis. 413; *Robinson v. Hurley*, 11 Iowa, 410; *Davis v. Funk*, 39 Pa. St. 243; *Elder v. Rouse*, 15 Wend. 218; *Washburn v. Pond*, 2 Allen, 474; *Tucker v. Wilson*, 1 P. Wms. 261; *Kemp v. Westbrook*, 1 Ves. 278.

<sup>5</sup> *Bailey v. Colby*, 34 N. H. 29; *Ashton's Appeal*, 73 Pa. St. 153; *Belden v. Perkins*, 78 Ill. 449; *McNeill v. Tenth Nat. Bank*, 55 Barb. 59; *Shelton v. French*, 33 Conn. 489; *Moses v. Conham, Owen*, 123; *Whitaker v. Sumner*, 20 Pick. 399.



where on default of payment the sale is made irregularly or in violation of statutory requirements as to manner of sale. But whether the sale is void, because it is made before the maturity of the debt,<sup>1</sup> or because the sale is for any reason irregular,<sup>2</sup> in either case, the purchaser will at least get whatever title the selling pledgee had; and will have the right to hold the pledge against the demand of the pledgor, until the latter pays the debt, to secure which the pledge was given. And until the pledgor tenders payment of his debt to the purchaser from the pledgee, the purchaser cannot be held liable for conversion.

§ 317. **Delivery of goods to bailee for sale — Sale by factors — Factor's acts.** — Where goods are delivered to a bailee for sale by him, he has given him the power to sell the goods, and, of course, a purchaser for value will receive a perfect title, which will prevail against the owner of the goods. This is the general rule. But if the factor or commission merchant,<sup>3</sup> for such are the names of a bailee for sale, transfers the property, consigned to him, to a creditor in satisfaction of his own debt,<sup>4</sup> or exchanges the goods for others instead of selling them,<sup>5</sup> he will exceed his powers, and the purchaser will not acquire such a title as

<sup>1</sup> *First Nat. Bank v. Boyce*, 78 Ky. 42; *Belden v. Perkins*, 78 Ill. 449; *Lewis v. Mott*, 86 N. Y. 395; *Donald v. Suckling*, L. R. 1 Q. B. 585. The pledgee has the right to repledge the goods for his own debt, and the repledgee has the right to hold against the owner, until he pays his debt, to secure which the pledge was originally given. *Talty v. Freedman's Bank*, 93 U. S. 321; *Donald v. Suckling*, *supra*; *Halliday v. Holgate*, L. R. 3 Ex. 299.

<sup>2</sup> See *Talty v. Freedman's Bank*, 93 U. S. 321; *Kidney v. Persons*, 41 Vt. 386; *Bulkeler v. Welch*, 31 Conn. 339; *Lewis v. Mott*, 86 N. Y. 395; *Baltimore Mar. Ins. Co. v. Dalrymple*; 25 Md. 142; *Halliday v. Holgate*, L. R. 3 Ex. 299.

<sup>3</sup> See *ante*, § 273.

<sup>4</sup> *Parsons v. Webb*, 8 Greenl. 38; *Rodick v. Coburn*, 68 Me. 170.

<sup>5</sup> *Haas v. Damon*, 9 Iowa, 589; *Trudo v. Anderson*, 10 Mich. 357; *Wing v. Neal*, 2 Atl. Rep. 881 (Me.).

can be sustained against the demands of the real owner. And although the factor has a lien on the goods for the advances made, and for his commissions which he may assign or pledge as security for his own debt,<sup>1</sup> if he pledge the goods of his consignor for a larger amount than for which he has a lien on the goods, to the extent of the excess in the amount of the pledge he has been guilty of a conversion of the pledgor's goods, and the pledgor may recover his goods from the pledgee, upon the payment of his dues to the commission merchant or factor.<sup>2</sup> In all these cases, the *bona fide* purchaser gets no better title than what his vendor had against his principal, and, therefore, cannot resist the claim of the owner to the property.<sup>3</sup> But it is different with the effect of the factor's disobedience of his principal's instructions in making the sale, as to the price and the terms and conditions of the sale. As to these instructions, when they are not known to the buyer, the factor alone is bound by them, and a *bona fide* purchaser from him in violation of them, but in accordance with the prevalent mercantile custom and usage, will get a good title to the goods against the principal, notwithstanding the factor's divergence from his orders.<sup>4</sup>

But, in order to enable a *bona fide* purchaser from a factor — or one who is intrusted with the possession of the goods, and the indicia of title, such as a bill of lading or warehouse receipt, with the power to sell, — to feel sure of his title, statutes have been passed in several of the States, as well as in England, which provide generally that where

<sup>1</sup> Donald v. Suchling, L. R. 1 Q. B. 585.

<sup>2</sup> City Bank v. Barrows, L. R. 5 App. Cas. 664; Wright v. Solomon, 19 Cal. 64; Glidden v. Lucas, 7 Cal. 26; Horr v. Barker, 11 Cal. 393; Hutchinson v. Bows, 6 Cal. 385; McCreary v. Gains, 55 Tex. 485; Nowell v. Pratt, 5 Cush. 111; Bannennan v. Quackenbush, 11 Daly, 529; McLachlin v. Brett, 34 Hun, 478.

<sup>3</sup> But see, *contra*, Higgins v. Burton, 23 Law J. Ex. 32.

<sup>4</sup> Sargent v. Blunt, 16 Johns. 74; Arnold v. Halenbake, 5 Wend. 34.

one takes property from a factor in due course of business, either in exchange or pledge, or otherwise, without knowledge of the real relation of the vendor to the goods and of the defects of his title, when the goods are in the possession of the factor or he possesses the so-called documents of title such as the bill of lading, warehouse or elevator receipt, or dock-warrant, the purchaser will get a perfect title which he may successfully assert against the principal and owner of the goods. Such statutes are to be found in England,<sup>1</sup> Canada,<sup>2</sup> New York,<sup>3</sup> Massachusetts,<sup>4</sup> Alabama,<sup>5</sup> Maine, Ohio, California<sup>6</sup> and perhaps in other States;<sup>7</sup> and it seems that in some of the States, under peculiar principles, the doctrines of the factor's acts will be recognized and applied at common law, so that independently of statute a factor, or one who is intrusted with the possession of the goods, may in excess of his authority to sell pass a good title to his purchaser, which he may successfully assert against the owner of the goods.<sup>8</sup>

But in order that the purchaser may claim a perfect title against the owner, under these acts, the requirements of the statute must be complied with. In the first place, the per-

<sup>1</sup> See *Cole v. Northwestern Bank*, 9 C. P. 470; 10 C. P. 354; *Navulsho v. Brownsigg*, 2 De Gex, M. & G. 441, 445, notes; *Kaltenbach v. Lewis*, L. R. 24 Ch. D. 54; *Johnson v. Credit Lyonnais*, 2 C. P. Div. 224; 3 C. P. Div. 32.

<sup>2</sup> *In re Coleman*, 86 Up. Can. Q. B. 559; *Cockburn v. Sylvester*, 27 Up. Can. C. P. 34; *Todd v. Liverpool, &c., Ins. Co.*, 20 Up. Can. C. P. 523.

<sup>3</sup> *Jennings v. Merrill*, 20 Wend. 9.

<sup>4</sup> *De Wolf v. Gardner*, 12 Cush. 19; *Ullman v. Barnard*, 7 Gray, 554; *Mich. State Bank v. Gardner*, 15 Gray, 362.

<sup>5</sup> *Bott v. McCoy*, 20 Ala. 578.

<sup>6</sup> *Wisp v. Hazard*, 66 Cal. 459; *Green v. Campbell*, 52 Cal. 586, 589.

<sup>7</sup> See *Warren v. Martin*, 11 How. 209.

<sup>8</sup> See *Crocker v. Crocker*, 31 N. Y. 507; *Rawles v. Deshler*, 28 How. Pr. 66; *s. c.* 4 Abb. App. Cas. 12; *Quinn v. Davis*, 78 Pa. St. 15; *Barker v. Dinsmore*, 72 Pa. St. 427; *Galvin v. Bacon*, 11 Me. 28; *McMahon v. Sloan*, 12 Pa. St. 229; *Western Un. R. R. Co. v. Wagner*, 65 Ill. 197; *Nixon v. Brown*, 57 N. H. 34; *Higgins v. Burton*, 23 Law J. Ex. 32.

son undertaking to sell must be an agent, who is intrusted with the possession for the purpose of sale; in other words, he must be a factor or commission merchant.<sup>1</sup> The statute will not apply to a warehouseman, wharfinger or other bailee who is not given the power to sell,<sup>2</sup> nor to agents, who do not make it their regular business to sell goods for others.<sup>3</sup>

In the second place, the agent vendor must be entrusted either with the possession of the goods, or with symbolical documents of title, such as the bill of lading, or the warehouse or elevator receipt.<sup>4</sup> A broker does not come within the operation of the statute.<sup>5</sup> But in every case where the agent vendor produces the document of title as evidence of his authority to sell, in order that the *bona fide* purchaser may claim a good title against the principal, the agent must have procured the document in good faith, and with the consent of the owner of the goods. If he procured it from the owner, without his consent or co-operation, the purchaser does not get a good title to the goods.<sup>6</sup>

<sup>1</sup> *Stallenwerck v. Thacher*, 115 Mass. 224; *Thacher v. Moors*, 184 Mass. 156; *Kinsey v. Leggett*, 71 N. Y. 395; *Dows v. Nat. Ex. Ch. Bank*, 91 U. S. 618; *Mechanics, etc., Bank v. Farmers, etc., Bank*, 60 N. Y. 40; *First Bank of Toledo v. Shaw*, 61 N. Y. 299; *Nickerson v. Darrow*, 5 Allen, 419.

<sup>2</sup> *Mark v. Whittenbury*, 2 Barn. & Adol. 484; *Cole v. Northwestern Bank*, 9 C. P. 470; *s. c.* 10 C. P. 354. But see *Barnes v. Swarnson*, 4 Best & Smith, 270.

<sup>3</sup> *Wood v. Rowcliffe*, 6 Hare, 188; *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Wellomat*, 1 C. B. 670. But see *Hayman v. Flewker*, 13 C. B. (N. s.) 519.

<sup>4</sup> *Howland v. Woodruff*, 60 N. Y. 73; *Cartright v. Wilmerding*, 24 N. Y. 521; *Pegram v. Carson*, 10 Bosw. 505; *Bonito v. Mosquera*, 2 Bosw. 401. See *Jenkyns v. Osborne*, 7 Man. & G. 678; *Tuentes v. Montis*, L. R. 3 C. P. 268; *Jones v. Hodgkins*, 61 Me. 480; *Johnson v. Credit Lyonnais*, L. R. 3 C. P. D. 32.

<sup>5</sup> *Stollenwerck v. Thatcher*, 115 Mass. 224. See *Johnson v. Credit Lyonnais*, L. R. 3 C. P. D. 32.

<sup>6</sup> *Sheppard v. Union Bank of London*, 7 Hurl. & N. 661; *Kingsford v. Merry*, 11 Ex. 577; 1 Hurl. & N. 503; *Higgins v. Burton*, 26 Law J. Ex. 342; *Baines v. Swarnson*, 4 Best & Smith, 270.

In the next place, the scope of the protection to the *bona fide* purchaser will depend upon the language of the statute. If the statute refers only to the factor's power to sell, it will not protect the *bona fide* pledgee from the claims of the owner of the goods.<sup>1</sup> The factors may sell on credit,<sup>2</sup> and for almost any kind of valuable consideration, including contemporary debts due to the factor; but they cannot pass a good title to another in satisfaction of the factor's pre-existing indebtedness.<sup>3</sup>

Finally, the fact that the principal has already sold the goods does not prevent the factor from passing under these statutes the good title to his purchaser, which he may enforce against the purchaser from the principal, provided the factor had at the time of sale in his possession either the goods or documents of title.<sup>4</sup>

§ 318. **Documents of title.** — In discussing the effect of factor's acts on the rights of *bona fide* purchasers, frequent reference is made to *documents of title*, and the possession of them duly indorsed or transferred enables the factor to pass a good title to the innocent purchasers, however defective his own title and authority to sell may be. But it is still an important question how far these documents of title have the negotiable quality, independently of the factor's acts; and this question will be answered in the subsequent paragraphs, reference being made to the negotiability of certificates of stock, warehouse receipts and bills of lading.

<sup>1</sup> DeWolf v. Gardner, 12 Cush. 19; Michigan State Bank v. Gardner, 15 Gray, 374; Gray v. Agnew, 95 Ill. 315; Laussat v. Lippincott, 6 Serg. & R. 391; Bott v. McCoy, 20 Ala. 578; Hazard v. Fiske, 18 Hun, 277; s. c. 88 N. Y. 287; McCreary v. Gaines, 55 Tex. 485; Wright v. Solomon, 19 Cal. 64; Insurance v. Kiger, 108 U. S. 352.

<sup>2</sup> Pinkham v. Crocker, 77 Me. 563; Goodenow v. Tyler, 7 Mass. 36; Greely v. Bartlett, 1 Me. 172.

<sup>3</sup> Warner v. Martin, 11 How. 209.

<sup>4</sup> Jones v. Hodgkins, 61 Me. 480.

§ 319. **Certificates of stock.** — Certificates of stock are classed as *quasi*-negotiable instruments. But while sometimes the transferee takes a better right in and to the certificate of stock, than what his immediate transferrer had, this arises from the application of other than the principles of negotiability. Thus, if the owner of stock should intrust his agent with the possession of his certificates of stock, payable to bearer, or indorsed in blank, any *bona fide* purchaser from the agent would be able to assert a superior title to that of the principal, although the agent had fraudulently disposed of his property, and against his express instructions. This conclusion is reached by an application of the general principle of agency, that the principal is bound by all the acts of the agent which fall within the apparent scope of his authority.<sup>1</sup>

So, likewise, the purchaser of the certificate of stock, who takes possession of the certificate, acquires a better title than the prior purchaser of the same certificate, who makes the purchase by formal agreement or otherwise, without taking into his possession the muniment of title, in the shape of the certificate. And this is true, even though there has been a transfer of the shares to the first purchaser on the books of the corporation.<sup>2</sup> And, on the

<sup>1</sup> *Johnston v. Laffin*, 108 U. S. 800; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 871; *Prall v. Tilt*, 28 N. J. Eq. 480; *Mt. Holly Turnpike Co. v. Ferree*, 2 C. E. Green, 117; *Thompson v. Toland*, 48 Cal. 99; *Wood's Appeal*, 92 Pa. St. 379; *Burton's Appeal*, 93 Pa. St. 214; *Bridgeport Bank v. New York, etc., R. R. Co.*, 80 Conn. 275; *Duke v. Cahawba Co.*, 10 Ala. 82; *Fraser v. Charleston*, 11 S. C. 486; *Commercial Bank v. Kortright*, 22 Wend. 348; *N. Y. & N. H. R. R. Co. v. Schuyler*, 84 N. Y. 30; *Leitch v. Wells*, 48 N. Y. 585; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *McNeill v. Tenth Nat. Bank*, 46 N. Y. 325; *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 220; *Rumball v. Metropolitan Bank*, 2 Q. B. Div. 194.

<sup>2</sup> *Driscoll v. W. Bradley, etc., C. M. Co.*, 59 N. Y. 96. See also *Bank v. Lanier*, 11 Wall. 869; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616. But see, *contra*, *Shropshire Union R. & C. Co. v. The Queen*, L. R. 7 H. L. Cas. 496.

other hand, if the corporation should make a transfer of the shares on its books to the wrong party, without securing a surrender of the certificate, it would still be liable to the rightful party for the shares of stock which his certificate calls for.<sup>1</sup>

But the general rule is that the purchaser of the certificates of stock gets no better title than what his vendor had; and if stock, which is payable to bearer or indorsed in blank, is stolen or found, and unlawfully transferred to an innocent purchaser for value the real owner may nevertheless recover it.<sup>2</sup>

The customary requirement that the transfer shall be made on the books of the company is for the protection of the corporation, and cannot affect the rights of purchasers from the shareholder, who may acquire, as against every one but the corporation, an absolute right of property in the stock by any of the common methods of assignment of *choses in action*.<sup>3</sup> But there are authorities which hold that only by a transfer on the books of the company, where that is the required mode of transfer, can the purchaser claim a superior title to the stock against the creditors of

<sup>1</sup> *Cushman v. Thayer Mfg. Co.*, 67 N. Y. 267; *Bank v. Lanier*, 11 Wall. 369; *Smith v. Am. Coal Co.*, 7 Lans. 317.

<sup>2</sup> *Berelch v. Marye*, 9 Nev. 312; *Burton's Appeal*, 93 Pa. St. 214 (*semble*); *Railroad v. Howard*, 7 Wall. 415: "Written contracts are not necessarily negotiable simply because, by their terms, they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them but the assignees took them subject to every equity in the hands of the original owners."

<sup>3</sup> *Black v. Zacharie*, 8 How. 483; *Newberry v. Detroit, etc., Iron Co.*, 17 Mich. 141; *Bank of Utica v. Smalley*, 2 Cowen, 770; *Gilbert v. Manchester Mfg. Co.*, 11 Wend. 627; *Sargent v. Essex Marine R. R. Co.*, 9 Pick. 202; *Western v. Bear River, etc., Co.*, 6 Cal. 425; *Commonwealth v. Watmough*, 6 Wheat. 139; *Stebbins v. Phoenix Ins. Co.*, 3 Paige, 350; *Farmers' Bank v. Iglehart*, 6 Gill, 50; *Johnson v. Underhill*, 52 N. Y. 203; *Farmers' Bank v. Wasson*, 48 Iowa, 338; *Johnston v. Lafin*, 103 U. S. 804.

the transferrer.<sup>1</sup> But, as against the corporation, no transfer of a private nature is valid, unless there has been a corresponding transfer on the books of the corporation, in accordance with the requirement of its by-laws, or the provisions of its charter.<sup>2</sup>

§ 320. **Warehouse receipts.**—During the last fifty years, grain of all kinds has been handled by merchants in bulk; and, for the more convenient transportation and transfer of the same, it is kept in bulk in public warehouses, called elevators, where all the grain received is stored in large bins according to quality, and irrespective of any prior ownership. Upon receiving the grain, the warehouseman or elevator company issues documents, in which the receipt of a certain quantity of grain of a certain quality and kind is acknowledged, and the promise is made to deliver it to the order of the depositor. These warehouse receipts are taken by the depositor or the exchanges of the cities as the representative of the grain itself; and when the grain, which they represent, is sold, the certificates are transferred by indorsement and delivery, or by delivery alone, if made deliverable to bearer or indorsed in blank. And the title to the grain will be as effectually transferred, as if the grain itself had been delivered.

In consequence of the reliance placed by the mercantile world upon the absolute liability of the warehouseman on

<sup>1</sup> *Sabin v. Bank of Worcester*, 21 Me. 353; *Foster v. Essex Bank*, 5 Gray, 373; *Pinkerton v. Manchester, etc., R. R. Co.*, 42 N. Y. 424; *People's Bank v. Gridley*, 91 Ill. 457.

<sup>2</sup> *Union Bank v. Laird*, 2 Wheat. 390, Story, J.: "No person can acquire a legal title to any shares except under a regular transfer according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice." See also *Brent v. Bank of Washington*, 10 Pet. 596; *German Security Bank v. Jefferson*, 10 Bush, 328; *Rogers v. Huntington Bank*, 12 Serg. & R. 73; *Farmers' Bank v. Iglehart*, 6 Gill, 50.



his receipt, a disposition has been manifested to apply the principles of negotiable instruments to these receipts and to give to the *bona fide* holder the same superior rights as such a holder of bills and notes has. And in many of the States, the same end has been attained by the enactment of statutes. But independently of statute, it is very generally held that the warehouse receipt is not a negotiable instrument, the principal objection being that the warehouse receipt calls for the delivery of goods, instead of the payment of money.<sup>1</sup> The receipt is so far non-negotiable, that the warehouseman is not liable even to a *bona fide* holder if his agent has issued a receipt without getting possession of the goods.<sup>2</sup> But, on the other hand, if the goods have been stored, and the warehouse receipt has been rightfully issued, the warehouseman cannot deliver the goods to any one but the lawful holder of the receipt; and the warehouseman is liable to the holder of the receipt, if the goods have been delivered to any one else, without the production and surrender of the receipt properly indorsed.<sup>3</sup>

The warehouseman is not a guarantor of the title of property placed in his custody, although his receipts therefor are by statute negotiable.<sup>4</sup>

<sup>1</sup> *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; *Burton v. Curyea*, 40 Ill. 320; *Canadian Bank v. McCrea*, 40 Ill. 281 (see Illinois statute on the subject); *Spangler v. Butterfield*, 6 Col. 356; *Solomon v. Bushnell*, 11 Oreg. 272 (50 Am. Rep. 475); *Durr v. Hervey*, 44 Ark. 301 (51 Am. Rep. 594); *Louisville Bank v. Boyce*, 78 Ky. 42; *Griswold v. Haven*, 25 N. Y. 595. But see *Allen v. Maury*, 66 Ala. 10; *Fourth Nat. Bank v. St. Louis Compress Co.*, 11 Mo. App. 333.

<sup>2</sup> *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; *Griswold v. Haven*, 25 N. Y. 595; *Burton v. Curyea*, 40 Ill. 320; *McBowie v. Spader*, 3 Thomp. & C. 690; 1 Hun, 193. See *contra* *McNeil v. Hill*, 1 Woolw. C. C. 96.

<sup>3</sup> *Harris v. Bradley*, 2 Dill. C. C. 284; *Hale v. Milwaukee Dock Co.*, 29 Wis. 492; *Shepardson v. Cary*, 29 Wis. 34; *Cral v. Phillips*, 66 Ill. 216; *Greenbaum v. Majibben*, 10 Bush, 419. But see *Mortimore v. Ragsdale*, 62 Miss. 86.

<sup>4</sup> *Mechanics', etc., Ins. Co. v. Klger*, 103 U. S. 352.

When a warehouseman, having in store a quantity of wheat deposited by several persons, for which under the statute he issues receipts to each depositor, fraudulently disposes of part of the wheat, the receipt-holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting.<sup>1</sup>

§ 321. **Definition and nature of bills of lading.**—A bill of lading is very often called a negotiable instrument.<sup>2</sup> But, although it does possess some of the qualities of negotiability,<sup>3</sup> it is not strictly one independently of statute, and is more properly described as *quasi-negotiable*.<sup>4</sup>

The bill of lading may be defined to be a written acknowledgment by a common carrier of the receipt of certain goods described therein, and an agreement to transport them to their place of destination, to be there delivered in good order to the consignee or his assigns. It has, therefore, a double character, it being both a receipt and contract for the carriage of the goods.<sup>5</sup> As a receipt, it has become, under the influence of commercial custom, a symbol of property, and passes title to the goods by delivery in the same manner as if the goods were themselves delivered.<sup>6</sup> But so distinct and separate are the two characters

<sup>1</sup> Daws v. Eckstone, 1 McCrary C. C. 434.

<sup>2</sup> Lickbarrow v. Mason, 2 T. R. 63; Berkling v. Watling, 7 Ad. & E. 22; Bell v. Moss, 5 Whart. 189.

<sup>3</sup> See *post*, § 323.

<sup>4</sup> Gurney v. Behrend, 3 E. & B. 622; 22 L. J. Q. B. 265; Blanchard v. Page, 8 Gray, 297; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; National Bank v. Merchants' Nat. Bank, 91 U. S. 98; Barnard v. Campbell, 55 N. Y. 462.

<sup>5</sup> Redfield on Carriers, § 247; Knox v. The Nivella, Crabbe, 534; 1 Smith Lead. Cas. 879 *et seq.*; Haille v. Smith, 1 Bos. & Pul. 564; Howard v. Shepherd, 19 L. J. C. B. 248; Sanders v. Vanzeller, 12 L. J. Exch. 497.

<sup>6</sup> Gardner v. Howland, 2 Pick. 599; Empire Trans. Co. v. Steele, 70 Pa. St. 190; Indiana, &c., Bank v. Colgate, 4 Daly, 41; Newhall v. Central Pac. R. R. Co., 51 Cal. 345; Newsom v. Thornton, 6 East, 41; Mears

of the bill of lading according to the common law, that the assignee of the consignee could sue the common carrier for refusing to deliver the goods, called for by the bill of lading; but he could not recover damages of the carrier for refusing to transport them, the bill of lading, as an agreement for the carriage of the goods, being according to the common-law non-assignable.<sup>1</sup>

The bill of lading, as a symbol of property, is exhausted and becomes extinguished as soon as the goods have been delivered by the common carrier to the proper party. Its symbolical character is taken away by the delivery of the goods; and thereafter the owner's title to the goods does not rest upon the bill of lading, but upon the possession of the goods.<sup>2</sup>

§ 322. **Form and contents of the bill of lading.** — The bill of lading is usually issued in sets of three; one being retained by the common carrier, a second by the consignor, and a third to be sent to the consignee. In case of any variance between them in regard to terms, the contract is to be interpreted according to the terms of the copies delivered to the consignor. The copy kept by the common carrier cannot control the terms of the contract, since it is but a mere memorandum in the hands of the carrier.<sup>3</sup> But the number of copies is immaterial. There may be four copies;<sup>4</sup> and yet there need not be more than one.<sup>5</sup>

*v. Waples*, 3 *Houst.* 582; *Mower v. Peabody*, 3 *Kern.* 121; *Mechanics', &c., Bank v. Farmers', &c., Bank*, 60 *N. Y.* 47.

<sup>1</sup> *Halle v. Smith*, 1 *Bos. & Pul.* 564; *Thompson v. Downing*, 14 *L. J. Exch.* 320; *Howard v. Shepherd*, 19 *L. J. C. P.* 248; *Sanders v. Vanzeller*, 12 *L. J. Exch.* 497.

<sup>2</sup> *Hatfield v. Phillips*, 9 *M. & W.* 467; *Mottram v. Heyer*, 5 *Denio*, 632. See *Meyerstein v. Barber*, *L. R.* 2 *C. P.* 661; 86 *L. J. C. P.* 361; *First Nat. Bank v. Kelly*, 57 *N. Y.* 34; *Helskell v. Farmers', &c., Bank*, 89 *Pa. St.* 155.

<sup>3</sup> *The Thames*, 14 *Wall.* 98.

<sup>4</sup> *Lickbarrow v. Mason*, 2 *T. R.* 63.

<sup>5</sup> *Dows v. Perrin*, 16 *N. Y.* 325.

Where there are three or more copies of the bill of lading, all the copies together constitute but one contract and but one obligation, so far as the common carrier is concerned. And if the copies are transferred to different parties, there can be but one claim for goods against the carrier. In such a case, where the equities are equal, the carrier must deliver to the one who first gets possession of the copy bill of lading.<sup>1</sup>

The bill of lading should contain a description of the quantity and condition of the goods received, the marks on the same, the names of consignor and consignee, the places of shipment and discharge, and the price of the freight. If any limitations upon the liability of the common carrier have been agreed upon between the parties, they should also be expressed in the bill of lading. The shipper and carrier are both bound by the express terms of the bill of lading which is signed; and its terms cannot be varied by parol evidence of agreements, which are not incorporated in the bill of lading.<sup>2</sup>

Where the bill of lading acknowledges the receipt of goods "in good order and well conditioned," it has reference only to their external condition, and is not a guaranty of good condition internally.<sup>3</sup>

The bill usually provides for the delivery of the goods to a named consignee, the consignee being either the consignor or some one else. The effect is the same, when the consignor has indorsed the bill to the person for whom the goods were intended, as if the bill had been originally made out in the name of this latter person.<sup>4</sup> And where the

<sup>1</sup> *Lamb v. Durrant*, 22 Mass. 54; *Stevens v. Boston, etc., R. R. Co.*, 8 Gray, 262; 1 Smith Lead. Cas. 891.

<sup>2</sup> *Gage v. Morse*, 12 Allen, 410; *Germania Fire Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90; *Belger v. Dinsmore*, 51 N. Y. 166.

<sup>3</sup> *Richards v. Doe*, 100 Mass. 524; *The Olbers*, 8 Ben. 148; *Hastings v. Pepper*, 11 Pick. 48; *The Oriflamme*, 1 Saw. 176.

<sup>4</sup> *Walley v. Montgomery*, 3 East, 585.

place for the name of the consignee is left blank, it may be subsequently filled up with the name of any one who lawfully gets possession of the bill of lading.<sup>1</sup>

§ 323. **Transfer of bill of lading — Its negotiability.** The bill of lading is transferable usually by indorsement, and strictly only by the consignee.<sup>2</sup> But where the consignor owns the goods and ships them on his own account, the consignee is in fact, then, only his agent, and he can by his own assignment of the bill of lading give a title to the goods, which will prevail against every one but a *bona fide* transferee of the consignee.<sup>3</sup>

Delivery of the bill is as essential to pass title to the goods as the indorsement.<sup>4</sup> And where the goods are made by the bill deliverable to bearer, or where the bill of lading has been indorsed in blank, the delivery of the bill without any indorsement or other writing is all that is necessary to pass the title to the goods.

Not only may the indorsement of the bill of lading be made in blank, but it may also be made conditional or restrictive, and the indorsee takes it under those circumstances subject to the named conditions or restrictions.<sup>5</sup>

As has been stated in a previous paragraph, the bill of lading is at common law only *quasi-negotiable*. Unlike the bill of exchange, the transferrer of a bill of lading does not give any better title to the goods to his transferee than what he has himself, where he either found or stole the bill, or bought it from one who had found or stolen it; and this is the case even where the bill of lading was indorsed in blank, and transferred by delivery to an innocent pur-

<sup>1</sup> 2 Daniel's Negot. Inst., § 1786; Smith Mercantile Law, 377.

<sup>2</sup> The Sally Magee, 3 Wall. 457.

<sup>3</sup> Conrad v. Atlantic Ins. Co., 1 Pet. 445.

<sup>4</sup> Allen v. Williams, 12 Pick. 297; Buffington v. Curtis, 15 Mass. 528.

<sup>5</sup> Barrow v. Coles, 3 Camp. 92; Walley v. Montgomery, 3 East, 585.

chaser.<sup>1</sup> But where the bill of lading has been actually transferred by the real owner, but it was procured from him through the fraud of the transferee, and the transferee subsequently sold it to an innocent purchaser, the *bona fide* purchaser obtains a good title to the same, and the defense of fraud cannot be set up against him.<sup>2</sup>

The *bona fide* transferee will however, in taking the bill of lading, defeat the vendor's right of *stoppage in transitu*. As long as the consignee retains the bill, the vendor's right of *stoppage in transitu* still exists; but as soon as the bill of lading has been transferred to a *bona fide* holder for value, this right is at an end.<sup>3</sup> But the right is not destroyed or taken away by an assignment of the consignee's title to the goods in any other way than by an indorsement and transfer of the bill of lading. In such a case, the assignee will take the title of the assignor to the goods, subject to the vendor's right of *stoppage in transitu*.<sup>4</sup>

It has also been held that the *bona fide* transferee acquires superior rights against the common carrier, in that the carrier cannot dispute the correctness of the acknowledgments contained in the bill of lading even though the goods, which he acknowledged in the bill to have received, had never been delivered to him.<sup>5</sup> But the author-

<sup>1</sup> Gurney v. Behrend, 2 El. & B. 622; 23 L. J. Q. B. 265; Dows v. Perrin, 16 N. Y. 333; Moore v. Robinson, 62 Ala. 537; Barnard v. Campbell, 55 N. Y. 462; Brower v. Peabody, 3 Kern. 126; Shaw v. Railroad Co., 101 U. S. 557; Emery v. Irving Nat. Bank, 25 Ohio St. 255. See Voss v. Robertson, 46 Ala. 488.

<sup>2</sup> Pease v. Gloahec, 1 Privy C. App. 219; Dows v. Greene, 24 N. Y. 644.

<sup>3</sup> Lickbarrow v. Mason, 1 Smith Lead. Cas. 895, 896; Dows v. Greene, 24 N. Y. 641; Becker v. Hallgarten, 86 N. Y. 167; Newhall v. Cent. P. R. Co., 51 Cal. 845; Gurney v. Behrend, 2 El. & B. 622; Emery v. Irving Nat. Bank, 25 Ohio St. 360.

<sup>4</sup> Holmes v. Crane, 2 Pick. 606; Craven v. Ryder, 6 Taunt. 433.

<sup>5</sup> Armour v. Mich. Cent. R. R. Co., 65 N. Y. 111; Sioux City & P. R. R. Co. v. First Nat. Bank, 10 Neb. 556; Savings Bank v. Atchison, etc., R. R. Co., 20 Kan. 519. As between the original parties, and except as to the *bona fide* transferee, the bill of lading is only *prima facie* evidence of

ities are divided on this subject and we find the weight of authority in favor of the proposition, that the carrier is not bound on the bill of lading issued by a clerk for goods, which had never been received by the carrier, since the clerk was not authorized to execute and issue the bill of lading except after the goods had been received. The common carrier, according to the following authorities, can set up the defense that the goods had never been received by him, even against a *bona fide* transferee of the bill of lading.<sup>1</sup> But if the goods are received by the carrier, the bill of lading will be conclusive of any other acknowledgment which the bill might contain.<sup>2</sup> And where the bill is issued with a guaranty of the quantity, no question can be raised as to that matter, since the statements in the bill are conclusive.<sup>3</sup>

The character of bills of lading is now regulated in very many States by statute, and in some of the States bills of lading are declared to be negotiable like other commercial paper. Under those statutes, the bill of lading may be expected to have all the characteristics of bills of exchange, which affect their negotiability.<sup>4</sup>

the truth of its acknowledgments. *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 Wall. 579; *Sears v. Wingate*, 3 Allen, 103; *Grace v. Adams*, 100 Mass. 505; *Dickenson v. Seelye*, 12 Barb. 102; *Meyer v. Peck*, 28 N. Y. 590; *Abbe v. Eaton*, 51 N. Y. 410; *Bissell v. Campbell*, 54 N. Y. 356; *Bates v. Todd*, 1 Mood. & R. 106; *Cox v. Peterson*, 30 Ala. 608.

<sup>1</sup> *The Schooner Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. (1882) 7; *Grant v. Norway*, 20 L. J. C. P. 93; 10 C. B. 669; *Hubbersty v. Ward*, 18 Eng. L. & Eq. 551; *McLean v. Flemming*, L. R. 2 S. App. 128; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; *Hall v. Mayo*, 7 Allen, 456; *Sears v. Wingate*, 3 Allen, 103; *Balt. & O. R. R. Co. v. Wilkens*, 44 Md. 11; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; *Union, etc., R. R. Co. v. Yeager*, 34 Ind. 1; *Louisiana Bank v. Lavelle*, 53 Mo. 380; *Fellows v. Steamer Powell*, 16 La. Ann. 316; *Hunt v. Miss. C. R. R. Co.*, 29 La. Ann. 449; *Dean v. King*, 23 Ohio St. 136; *Robinson v. Memphis, etc., R. R. Co.*, 9 Fed. Rep. 129.

<sup>2</sup> *Sears v. Wingate*, 3 Allen, 103.

<sup>3</sup> *Bissell v. Campbell*, 54 N. Y. 353.

<sup>4</sup> See *Tiedeman v. Knox*, 53 Md. 612; *Hale v. Milwaukee*, 29 Wis. 483;

§ 324. Demand, when necessary. — To the question whether demand of possession is necessary to be made of a purchaser from one having no absolute title to the goods, in order to make the retention of possession by the purchaser an act of conversion of the property of the real owner, two answers may be and are given, according to the standpoint from which the matter may be considered.

If in the act of conversion there is involved to any degree the element of criminal intent, or, to put it in a clearer light, if it is necessary for one to know that he is retaining the property of another in order to be guilty of conversion of the latter's property to his own use, then a *bona fide* purchaser is not liable for conversion, until the real owner has demanded of the purchaser the possession of the goods, and the latter has refused to give up the possession. And this has been the ruling in several of the States, particularly where the property has been purchased from a bailee.<sup>1</sup> But if conversion consists alone in the fact of appropriating to one's own use the personal property of another, whether it was done knowingly or innocently, then the offense of conversion is already committed as soon as adverse possession is taken of the goods

*Price v. Wisconsin Co.*, 48 Wis. 267; *Erie Dispatch Co. v. St. Louis Co.*, 6 Mo. App. 172; *Greenbaum v. Megibben*, 10 Bush, 419; *Merchant's Bank v. Union R. R. Co.*, 69 N. Y. 373. In *Shaw v. Railroad Co.*, 101 U. S. 557, it is held that although bills of lading are made by statute negotiable by indorsement and delivery, it does not follow that they are given every characteristic of negotiability which bills of exchange possess; and it was there held that the *bona fide* purchaser of a lost or stolen bill of lading cannot claim any better title than what the finder or thief had.

<sup>1</sup> *Storm v. Livingston*, 6 Johns. 44; *Pierce v. Vandyke*, 6 Hill, 618; *Twinam v. Swart*, 4 Lans. 263; *Marshall v. Davis*, 1 Wend. 109; *Nash v. Mosher*, 19 Wend. 481; *Fuller v. Lewis*, 13 How. Pr. 219; *Wood v. Cohen*, 6 Ind. 455; *Houston v. Dyche, Meigs*, 76; *Sherry v. Picken*, 10 Ind. 375; *Parker v. Middlebrook*, 24 Conn. 207; *Ely v. Ehle*, 3 Comst. 506; *Rawley v. Brown*, 18 Hun, 456; *Millspaugh v. Mitchell*, 8 Barb. 333; *Barrett v. Warren*, 3 Hill, 348. But see *Bates v. Conkling*, 10 Wend. 389; *Wells v. Raglan*, 1 Swan, 501.



of another, and does not depend upon any refusal of the real owner's demand for possession. Under this theory, the conclusion would be that demand of possession is not necessary to the liability for conversion, and such is the ruling of the majority of the courts.<sup>1</sup> If the *bona fide* purchaser takes the property from a conditional vendee, in which case the title remains in the vendor until the performance of the condition, it has been held that the necessity of the demand will depend upon whether the transfer was made before or after the breach of the condition, the demand being necessary in the first instance, and unnecessary in the latter.<sup>2</sup> But it has also been held to be necessary,<sup>3</sup> and unnecessary,<sup>4</sup> irrespective of the time of breach of the condition.

It is very generally held that the conditional vendor may without demand recover the property from the vendee's attaching creditors.<sup>5</sup>

<sup>1</sup> *Stanley v. Gaylord*, 1 Cush. 536; *Chapman v. Cole*, 12 Gray, 141; *Heckle v. Servey*, 101 Mass. 344; *Galvin v. Bacon*, 11 Me. 28; *Freeman v. Underwood*, 66 Me. 229; *Hyde v. Noble*, 18 N. H. 494; *Riford v. Montgomery*, 7 Vt. 411; *Bucklin v. Beal*, 38 Vt. 653; *Harker v. Dement*, 9 Gill, 7; *Johnson v. White*, 21 Miss. 484; *Gibbs v. Jones*, 46 Ill. 319; *Oleson v. Merrill*, 20 Wis. 487; *Harpending v. Meyers*, 55 Cal. 555; *Ward v. Carsan River Wood Co.*, 13 Nev. 44; *Surles v. Sweeney*, 11 Oreg. 21; *Whitman Mining Co. v. Tritle*, 4 Nev. 494; *Eldred v. Oconto Co.*, 33 Wis. 133; *Trudo v. Anderson*, 10 Mich. 357; *McNeil v. Arnold*, 17 Ark. 154; *Robinson v. McDonald*, 2 Ga. 116; *Deering v. Austin*, 34 Vt. 330; *Grant v. King*, 14 Vt. 367; *Lovejoy v. Jones*, 30 N. H. 164; *Rodick v. Coburn*, 68 Me. 170; *Whipple v. Gilpatrick*, 19 Me. 427; *Parsons v. Webb*, 3 Greenl. 38; *Carter v. Kingman*, 103 Mass. 517; *Gilmore v. Newton*, 9 Allen, 171; *Riley v. Boston Water Power Co.*, 11 Cush. 11. But, see *Talmage v. Scudder*, 38 Pa. St. 517; *Dunham v. Converse*, 28 Wis. 306.

<sup>2</sup> *Whitney v. McConnell*, 29 Mich. 12.

<sup>3</sup> *Wheeler & Wilson M. Co. v. Teetzlaff*, 53 Wis. 211; *Tufts v. Mot-tashed*, 29 Up. Can. C. P. 539.

<sup>4</sup> *Matthews v. Lucia*, 55 Vt. 308; *Stone v. Perry*, 60 Me. 48; *Everett v. Hall*, 67 Me. 497.

<sup>5</sup> *Hill v. Freeman*, 3 Cush. 257; *Stone v. Perry*, 60 Me. 48. See *Carter v. Kingman*, 103 Mass. 518; *Gilmore v. Newton*, 9 Allen, 171.

§ 325. Purchaser from one having a voidable or defeasible title — Sale upon condition subsequent and precedent. — So far we have discussed the rights of *bona fide* purchasers, who acquire the property in question from one altogether lacking in title to the general property in the goods, and as to them we have seen that good faith is of no help in resisting the demands for possession of the real owner. But a different rule prevails, where the present title to the goods has passed to the vendee, subject to the possibility of forfeiture for the breach of a condition. If the condition is subsequent, as where the sale is made subject to revesting of title in the vendor or default in payment of the price,<sup>1</sup> or subject to the vendor's right of repurchase,<sup>2</sup> or subject to the vendee's right of return of the goods, if they prove to be unsatisfactory;<sup>3</sup> in any one of these cases, the general property in the goods has passed to the vendee, and the goods have then ceased to be the property of the vendor. In view of this fact, it has been held that a *bona fide* purchaser from such a vendee will not only acquire whatever title the vendee (*i.e.*, his vendor) had, but also he will take it free from the condition subsequent, of which he knows nothing.<sup>4</sup>

But if the condition is precedent, and the effect of the contract of sale is that notwithstanding the delivery of the goods to the vendee the title to the goods remains in the vendor until the condition has been performed; then, since the vendee has not yet acquired the title to the goods and

<sup>1</sup> See *Lewis v. Palmer*, Hill & D. Supp. 68; *Chamberlain v. Dickey*, 31 Wis. 68; *Southwick v. Smith*, 29 Me. 228.

<sup>2</sup> *Hills v. Snell*, 104 Mass. 173, 177.

<sup>3</sup> *Moss v. Sweet*, 16 Q. B. 493; 20 Law J. Q. B. 167; *Ray v. Thompson*, 12 Cush. 281; *Hotchkiss v. Higgins*, 52 Conn. 205; *Perkins v. Douglass*, 20 Me. 317; *Martin v. Adams*, 104 Mass. 262; *McKinnee v. Bradley*, 117 Mass. 321; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Buswell v. Bicknell*, 17 Me. 344; *Hall v. Ætna Mfg. Co.*, 30 Iowa, 215; *Schlesinger v. Stratton*, 9 R. I. 578.

<sup>4</sup> See *post*, § 326.

he may be said to be altogether without any general property in the goods, as much so as the thief or a bailee for hire or custody, it is but reasonable to hold that the *bona fide* purchaser does not get any title from him which he may enforce against the claims of the conditional vendor. And such is the ruling of the great preponderance of authority not only where the condition was that the vendee shall have the right to inspect and examine the goods, subject to the right to return, if they did not prove satisfactory,<sup>1</sup> but, more particularly, where the condition is the prepayment of the price.<sup>2</sup> But there are authorities to

<sup>1</sup> See *ante*, § 218.

<sup>2</sup> *Harkness v. Russell*, 118 U. S. 668; *In re Binford*, 8 Hughes, 300; *Truman v. Hardin*, 5 Sawy. 115; *Gaylor v. Dyer*, 5 Cranch C. C. 461; *Holman v. Lock*, 51 Ala. 287; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Carroll v. Wiggins*, 30 Ark. 402; *McRae v. Merrifield*, 48 Ark. 160; *McIntosh v. Hill*, 1 S. W. Rep. 680; *s. c.* 47 Ark. (1886) 363; *Simpson v. Shackelford*, 4 S. W. Rep. 165; 49 Ark. 68; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244; *Forbes v. Marsh*, 15 Conn. 384; *Cragin v. Coe*, 29 Conn. 51; *Brown v. Fitch*, 43 Conn. 512; *Appleton v. Norwalk Library Co.*, 58 Conn. 4; *Goodwin v. May*, 28 Ga. 205; *Sims v. James*, 62 Ga. 260; *Augler v. Taunton Paper Co.*, 1 Gray, 621; *Brown v. Hayes*, 52 Me. 278; *Sanders v. Keser*, 28 Ohio St. 630; *Porter v. Pettingill*, 12 N. H. 299; *Fleck v. Warner*, 25 Kan. 492; *Solomon v. Hathaway*, 126 Mass. 482; *Duke v. Shackelford*, 56 Miss. 552; *Sage v. Sleutz*, 23 Ohio St. 1; *Colcord v. McDonald*, 123 Mass. 470; *Chisom v. Hawkins*, 11 Ind. 316; *Shireman v. Jackson*, 14 Ind. 459; *Hanway v. Wallace*, 18 Ind. 377; *Dunbar v. Rawles*, 28 Ind. 225; *Hodson v. Warner*, 60 Ind. 214; *Domestic Sewing Machine Co. v. Arthurhultz*, 63 Ind. 325; *Balley v. Harris*, 8 Iowa, 331; *Baker v. Hall*, 15 Iowa, 277; *Mosely v. Shattuck*, 43 Iowa, 540; *Hollowell v. Milne*, 16 Kan. 65; *Sawyer v. Shaw*, 9 Greenl. 47; *Whipple v. Gilpatrick*, 19 Me. 427; *Sawyer v. Fisher*, 32 Me. 28; *Hotchkiss v. Hunt*, 49 Me. 219; *Allen v. Delano*, 55 Me. 113; *Bunker v. McKenny*, 63 Me. 529; *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158; *Johnson v. Whittemore*, 27 Mich. 463; *Deyoe v. Jamison*, 33 Mich. 94; *Marquette Mig. Co. v. Jeffery*, 49 Mich. 283; *Parmelee v. Catherwood*, 36 Mo. 479; *Ridgeway v. Kennedy*, 52 Mo. 24; *Fosdick v. Schall*, 99 U. S. 235; *Mount v. Harris*, 1 Sm. & M. 185; *Heinbockle v. Zugbaum*, 5 Mont. 344; *Aultman v. Mallory*, 5 Neb. 178; *Cardinal v. Edwards*, 5 Nev. 36; *Davis v. Emery*, 11 N. H. 230; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446; *Cole v. Berry*, 42 N. J. L. 308; *Redewill v. Gillen*, 12 Pac. Rep.

the contrary, which maintain that the *bona fide* purchaser from a conditional vendee takes a perfect title free from the condition, whether it is subsequent or precedent.<sup>1</sup> Some of the cases only hold the condition good against attaching creditors, and are either doubtful about subvendees,<sup>2</sup> or expressly hold that the condition is invalid as to the latter.<sup>3</sup> In New York, the authorities are in an almost hopeless

(N. M.) 872; *Ellison v. Jones*, 4 Ired. 48; *Clayton v. Hester*, 80 N. C. 275; *Call v. Seymour*, 40 Ohio St. 670; *Singer Machine Co. v. Graham*, 8 Oreg. 17; *Rosendorf v. Hirschberg*, 8 Oreg. 240; *Goodell v. Fairbrother*, 12 R. I. 233; *Reeves v. Harris*, 1 Bailey, 563; *Gambling v. Read*, Meigs, 281; *Buson v. Dougherty*, 11 Humph. 50; *Harding v. Meitz*, 1 Tenn. Ch. 610; *Sinker v. Comparet*, 62 Tex. 470; *City Nat. Bank v. Tufts*, 63 Tex. 118; *Bigelow v. Huntley*, 8 Vt. 151; *Kent v. Buck*, 45 Vt. 18; *Grant v. King*, 14 Vt. 367; *Davis v. Bradley*, 24 Vt. 55; *Buckmaster v. Smith*, 22 Vt. 203; *Armington v. Houston*, 38 Vt. 448; *Child v. Allen*, 33 Vt. 476; *Clark v. Wells*, 45 Vt. 4; *Stevenson v. Rice*, 24 Up. Can. C. P. 245; *Tufts v. Mottashell*, 29 Up. Can. 539; *Mason v. Bickle*, 2 Ont. App. 291; *Walker v. Hyman*, 1 Ont. App. 345; *Mason v. Johnson*, 27 Up. Can. C. P. 208; *Price v. Jones*, 3 Head, 84; *Bradshaw v. Thomas*, 7 Yerg. 497; *Vasser v. Buxton*, 88 N. C. 339; *Parris v. Roberts*, 22 Ired. 268; *Marvin's Safe Co. v. Norton*, 48 N. J. L. 410; *Weeks v. Pike*, 60 N. H. 447; *Kimble v. Jackman*, 42 N. H. 242; *Lucy v. Bundy*, 9 N. H. 298; *Ketchum v. Brennan*, 53 Miss. 597; *Little v. Paige*, 44 Mo. 412; *Smith v. Lozo*, 42 Mich. 6; *Fifield v. Elmer*, 25 Mich. 48; *Cardinal v. Bennett*, 52 Cal. 416; *Putnam v. Lamphier*, 36 Cal. 151; *Leigh v. Mobile, &c., R. R. Co.*, 58 Ala. 165; *The Marina*, 19 Fed. Rep. 160; *Hemans v. Newton*, 4 Fed. Rep. 380; *Copland v. Bosquet*, 4 Wash. C. C. 588.

<sup>1</sup> See *Vaughan v. Hopson*, 10 Bush, 337 (overruling *Patton v. McCane*, 15 B. Mon. 555); *Greer v. Church*, 13 Bush, 430; *Hall v. Hinks*, 21 Md. 406; *Butler v. Gannon*, 53 Md. 333; *Martin v. Mathicot*, 14 Serg. & R. 214; *Haak v. Linderman*, 64 Pa. St. 499; *Brunswick, &c., Co. v. Hoover*, 95 Pa. St. 508; *Cochran v. Roundtree*, 3 Strobb. 217; *Old Dominion, &c., Co. v. Burckhardt*, 31 Gratt. 664; *Forrest v. Nelson*, 108 Pa. St. 481; *Stadtfield v. Huntsman*, 92 Pa. St. 53; *Rose v. Story*, 1 Pa. St. 190.

<sup>2</sup> *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 487; *Mich. Cent. R. R. Co. v. Phillips*, 60 Ill. 190; *Lucas v. Campbell*, 86 Ill. 447; *Van Duzor v. Allen*, 90 Ill. 499. The condition has been held good against subvendees, in *Jennings v. Gage*, 13 Ill. 610, but invalid against them in *Brundage v. Camp*, 21 Ill. 330. See *Fosdick v. Schall*, 99 U. S. 235; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664.

<sup>3</sup> *Williams v. Connoway*, 3 Houst. 63, attaching creditor; *Mears v. Waples*, 4 Houst. 62.

confusion, but by reading between the lines, it is believed that the New York courts may be pronounced to be in favor of the majority rule,<sup>1</sup> except that they are more inclined to hold a delivery of the goods to be a waiver of the condition of the prepayment of the price, and require, in order to prevent such a waiver, an express and explicit provision that the title is not to pass to the vendee with the delivery.<sup>2</sup> But in many of the States, including New York,<sup>3</sup> this matter is now regulated by statute, some of the statutes providing that to be enforceable against *bona fide* purchasers, the condition must be reduced to writing,<sup>4</sup> while in other States, the condition is required to be recorded.<sup>5</sup>

But the subsequent purchaser from the conditional vendee will get whatever title the vendee had. Hence he will be entitled to hold the possession against the demands of the vendor, until there has been a breach of the condition;<sup>6</sup> and by his performance or by the vendor's waiver of the condition, he can acquire an absolute title from the vendor,

<sup>1</sup> See *Ballard v. Burgett*, 40 N. Y. 314; *Hasbrouck v. Lounsbury*, 26 N. Y. 598; *Cole v. Mann*, 62 N. Y. 1; *Boon v. Moss*, 70 N. Y. 473; *Puffer v. Reeve*, 35 Hun, 480; *Anstin v. Dye*, 46 N. Y. 500.

<sup>2</sup> See *Comer v. Cunningham*, 77 N. Y. 391; *Wait v. Green*, 36 N. Y. 556; *Smith v. Lynes*, 5 N. Y. 41; *Parker v. Baxter*, 86 N. Y. 537; *Dows v. Kidder*, 14 N. Y. 128; *Baals v. Deshler*, 3 Keyes, 572; *Hintermister v. Lanè*, 27 Hun, 497.

<sup>3</sup> See Stat. 1884, ch. 315, and Stat. 1885, ch. 488.

<sup>4</sup> Mass. St. 1884, ch. 313; South Carolina, Statute of 1843.

<sup>5</sup> Iowa Code, § 1922. See *Pash v. Weston*, 52 Iowa, 675; *Budlong v. Cottrell*, 64 Iowa, 234; Kentucky, Gen. St., ch. 24, § 10; *Barney v. Smith Mfg. Co.*, 22 Rep. (Ky.) 782; Maine, Rev. St., ch. 111, § 5. In Maine, the provision requires the condition to be inserted in the note given for the purchase money, and if the price of the goods is over \$30, then the condition must be recorded. See *Boynton v. Libby*, 62 Me. 233; Missouri, Rev. Stat. (1879), § 2507; Nebraska, law of 1877; Vermont, *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender Co. v. Marshall*, 57 Vt. 232; unless the purchaser has had actual notice. *Kelsey v. Kendall*, 48 Vt. 24.

<sup>6</sup> *Newhall v. Kingsbury*, 181 Mass. 445; *Vincent v. Connell*, 13 Pick. 294; *Lambert v. McCloud*, 63 Cal. 162; *Hurd v. Fleming*, 34 Vt. 169; *Fairbank v. Phelps*, 22 Pick. 532. But see, *contra*, *Sims v. James*, 62 Ga. 260; *Bigelow v. Huntley*, 8 Vt. 159.

as effectually as the original vendee.<sup>1</sup> Whether the condition is broken or not, the subvendee has sufficient title to recover the full value of the goods from one, who has wrongfully taken them away.<sup>2</sup> But if the price was to have been paid in installments, and the breach occurred in the payment of one of the later installments, the subvendee cannot require the return to him of the installments already paid. These are forfeited by the breach of the condition,<sup>3</sup> and the vendor can recover of the subvendee, without offering to return these installments, which he has received.<sup>4</sup>

§ 326. Purchaser from the mortgagee of a chattel mortgage. — As has already been explained,<sup>5</sup> a chattel mortgage is held by most of the courts to be a sale upon condition subsequent, the condition being the payment of a debt; and the chattel mortgage is treated to such an extent as a conditional sale as that it is very difficult at times to distinguish it from the conditional sale with the right to repurchase.<sup>6</sup> Inasmuch as the conditional title of the mortgagee becomes absolute upon default in the payment of the debt, the mortgagee is in consequence entitled to take possession and sell the property on the strength of his legal title, transferring to the purchaser an absolute title against the mortgagor and the subsequent incumbrancers.<sup>7</sup> So far the question is easy of solution. But the question is difficult to

<sup>1</sup> *Day v. Bassett*, 102 Mass. 445; *Currier v. Knapp*, 117 Mass. 324; *Carpenter v. Scott*, 18 R. I. 477; *Chase v. Ingalls*, 122 Mass. 381; *Crompton v. Pratt*, 105 Mass. 255.

<sup>2</sup> *Harrington v. Kings*, 121 Mass. 269.

<sup>3</sup> See *ante*, § 210.

<sup>4</sup> *Angler v. Taunton Paper Co.*, 1 Gray, 621; *Brown v. Hayes*, 52 Me. 578; *Sanders v. Keser*, 28 Ohio St. 680; *Porter v. Pettingill*, 12 N. H. 299; *Fleck v. Warner*, 25 Kan. 492; *Duke v. Shackelford*, 56 Miss. 552; *Hughes v. Kelley*, 40 Conn. 148; *Sage v. Slutz*, 23 Ohio St. 1; *Colcord v. McDonald*, 128 Mass. 470.

<sup>5</sup> §§, 221, 222.

<sup>6</sup> See *ante*, § 224.

<sup>7</sup> See *post*, §§ 248, 250.

answer whether a *bona fide* purchaser before default gets any better title than the mortgagee had, whom the purchaser has treated in good faith as the absolute owner of the property. If the mortgage has been recorded, and the possession has been retained by the mortgagor, as is usual, the purchaser cannot claim to be anything more than the assignee of the mortgage, and acquires his rights and nothing more.<sup>1</sup> But if the mortgagee has possession before condition broken, to which he is entitled at common law, unless it has been expressly reserved to the mortgagor,<sup>2</sup> it would seem, in accordance with the rule laid down in the preceding section,<sup>3</sup> in respect to sales upon condition subsequent, that the *bona fide* purchaser from the mortgagee in possession would get a title which he could enforce against the mortgagor. A chattel mortgage only differs from a sale with the right to repurchase in that the mortgagor has the right to redeem the mortgage, even after condition broken,<sup>4</sup> and it has been held that the *bona fide* purchaser from the conditional vendee, in a sale with the right to repurchase, gets a perfect title to the goods, so far as the conditional vendor is concerned.<sup>5</sup> But it does not appear that the courts have ever been called upon to decide the rights of *bona fide* purchasers from a mortgagee in possession and before default, and the conclusion must rest upon argument by analogy.

§ 327. **Purchaser from fraudulent vendee.** — Inasmuch as the fraudulent vendee acquires the title subject to its avoidance by the vendor for the fraud, a defeasible title in other words,<sup>6</sup> it is now universally held that a *bona fide*

<sup>1</sup> See *ante*, § 245.

<sup>2</sup> See *ante*, § 241.

<sup>3</sup> See *ante*, § 325.

<sup>4</sup> See *ante*, §§ 204, 219, 224.

<sup>5</sup> *Hills v. Snell*, 104 Mass. 173, 177.

<sup>6</sup> *Rowley v. Bigelow*, 12 Pick. 307; *Paige v. O'Neal*, 12 Cal. 483;

purchaser from the fraudulent vendee will take the title free from its defect on account of the vendee's fraud, and that he may hold it against the claims of the defrauded vendor.<sup>1</sup> Some of the earlier authorities, both American

*Cochran v. Stewart*, 21 Minn. 485; *Rice v. Cutler*, 17 Wis. 398; *Shufeldt v. Pease*, 16 Wis. 659; *Sharp v. Jones*, 18 Ind. 314; *Wilson v. Fuller*, 9 Kan. 76; *Hawkins v. Davis*, 5 Baxt. 698; *Arendale v. Morgan*, 5 Sneed, 703; *Lee v. Portwood*, 41 Miss. 109; *Kern v. Thurber*, 57 Ga. 172; *Williamson v. Russel*, 89 Conn. 406; *Thompson v. Rose*, 16 Conn. 71; *Willoughby v. Moulton*, 47 N. H. 205; *Neal v. Williams*, 18 Me. 391; *Load v. Green*, 15 M. & W. 216; *Oakes v. Turquand*, L. R. 2 App. Cas. 325; *Clough v. London, &c., Co.*, L. R. 7 Ex. 26; *Morrison v. Univ. Marine Ins. Co.*, L. R. 8 Ex. 197; *Reese River Mining Co. v. Smith*, L. R. 4 App. C. 64; *Stevenson v. Newnham*, 13 C. B. 285; *Powell v. Hoyland*, 6 Ex. 67.

<sup>1</sup> *Neal v. Williams*, 18 Me. 391; *Titcomb v. Wood*, 38 Me. 563; *Kingsbury v. Smith*, 18 N. H. 109; *Thompson v. Rose*, 16 Conn. 71; *Williamson v. Russel*, 89 Conn. 406; *Hoffman v. Noble*, 6 Met. 68; *Moody v. Blake*, 117 Mass. 23; *Sargent v. Sturn*, 23 Cal. 359; *Ohio, &c., Co. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Gibson v. Moore*, 7 B. Mon. 92; *Powell v. Bradlee*, 9 Gill & J. 220; *Sinclair v. Healey*, 40 Pa. St. 417; *Thompson v. Lee*, 3 Watts & S. 479; *Ditson v. Randall*, 33 Me. 202; *Sparrow v. Chesley*, 19 Me. 79; *Trott v. Warren*, 11 Me. 227; *Paige v. O'Neal*, 12 Cal. 483; *Wilson v. Fuller*, 9 Kan. 76; *Rice v. Cutler*, 17 Wis. 362; *Hutchinson v. Watkins*, 17 Iowa, 475; *Clafin v. Cottman*, 77 Ind. 58; *Sharp v. Jones*, 18 Ind. 314; *Henson v. Westcott*, 82 Ill. 224; *Holland v. Swain*, 94 Ill. 154; *Combes v. Chandler*, 83 Ohio, 178; *Wood v. Yeatman*, 15 B. Mon. 271; *Gage v. Epperson*, 2 Head, 669; *Arendale v. Morgan*, 5 Sneed, 703; *Lee v. Portwood*, 41 Miss. 109; *Nicol v. Crittenden*, 55 Ga. 497; *Wickham v. Martin*, 13 Gratt. 427; *Mears v. Waples*, 3 Houst. 581; 4 Houst. 62; *Stevens v. Brennan*, 79 N. Y. 254; *Devoe v. Brandt*, 58 N. Y. 462; *Crocker v. Crocker*, 31 N. Y. 507; *Ash v. Putnam*, 1 Hill, 307; *Beaver v. Lane*, 6 Duer, 232; *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, 3 Duer, 373; *Saltus v. Everett*, 20 Wend. 267; *Root v. French*, 13 Wend. 570; *Easter v. Allen*, 8 Allen, 7; *Rowley v. Bigelow*, 12 Pick. 307; *Lynch v. Beecher*, 38 Conn. 490; *Willoughby v. Moulton*, 47 N. H. 205; *Lee v. Kimball*, 45 Me. 172; *White v. Garden*, 10 C. B. 919; *Kingsford v. Merry*, 11 Exch. 577; *Attenborough v. London & St. Katherine's Dock Co.*, L. R. 3 C. P. D. 450; 47 L. J. C. P. 763; *Pease v. Gloahee*, L. R. 1 P. C. 220; s. c. 3 Moore P. C. (N. S.) 566; *Babcock v. Lawson*, L. R. 4 Q. B. D. 394; *Mowrey v. Walsh*, 8 Cow. 238; *Andrews v. Districh*, 14 Wend. 84; *Hoffman v. Carew*, 22 Wend. 818; *Smith v. Lynes*, 1 Seld. 46; *Fassett v. Smith*, 23 N. Y. 252; *Paddon v. Taylor*, 44 N. Y. 371; *Barnard v. Campbell*, 65 Barb. 286; s. c. 58 N. Y. 73; *Hall v. Hinks*, 21 Md. 406; *Williams v. Given*, 6 Gratt. 268; *Old Do-*



and English, held that the fraudulent vendee acquires no title whatever.<sup>1</sup> But either later authorities have overruled these earlier cases, or the same result, so far as the *bona fide* purchaser is concerned, is attained by holding that the vendor is estopped from setting up his title to the goods against a *bona fide* purchaser, on the ground that he, the vendor, has invested the vendee with the possession and apparent ownership of the goods, and must suffer from this misplaced confidence, rather than the innocent purchaser, who has been misled in his reliance upon the fraudulent vendee's apparent ownership of the goods.<sup>2</sup>

§ 328. Purchaser of vendor, in fraud of creditors.— This subject has been already treated fully in another place,<sup>3</sup> and need not be discussed again.

§ 329. Who are bona fide purchasers.— In order that one may claim to be a *bona fide* purchaser, three things must be established.

*First*, he must show that he has acquired an interest in the property by voluntary or involuntary transfer from

minion S. S. Co. v. Burckhardt, 31 Gratt. 664; Kern v. Thurber, 57 Ga. 162; Larkin v. Eckwurz, 42 Ala. 322; Hawkins v. Davis, 5 Baxt. 698; s. c. 8 Baxt. 506; Arnott v. Cloudas, 4 Dana, 300; Dean v. Yates, 22 Ohio St. 388; Van Duzer v. Allen, 90 Ill. 499; McNab v. Young, 81 Ill. 11; Dickson v. Evans, 84 Ill. 451; Bell v. Cafferty, 21 Ill. 411; Cochran v. Stewart, 21 Minn. 435; Shufeldt v. Pease, 16 Wis. 689; Singer Co. v. Sammons, 49 Wis. 316; Wineland v. Coonce, 5 Mo. 296.

<sup>1</sup> Ash v. Putnam, 1 Hill, 308; Cary v. Hotalling, s. c. Olmstead v. Hotalling, 1 Hill, 811, 817; Butler v. Collins, 12 Cal. 457; Amer v. Hightower, 70 Cal. 440; Mowrey v. Walsh, 8 Cow. 238; Root v. French, 13 Wend. 570; Hall v. Hinks, 21 Md. 417; Martin v. Pewtress, 4 Burr. 2478; Gladstone v. Hadwen, 1 Maule & S. 517; Earl of Bristol v. Willsmore, 1 Barn. & C. 514; Duff v. Budd, 3 Brod. & B. 177; Irving v. Motley, 7 Bing. 548.

<sup>2</sup> Barnard v. Campbell, 65 Barb. 286; s. c. 55 N. Y. 456; s. c. 58 N. Y. 73. See Saltus v. Everett, 20 Wend. 279; Dows v. Rush, 28 Barb. 157; Combes v. Chandler, 33 Ohio St. 184; Craig v. Marsh, 2 Daly, 61; Malcom v. Loveridge, 18 Barb. 372; Cochran v. Stewart, 21 Minn. 435; Hall v. Hinks, 21 Md. 417.

<sup>3</sup> See *ante*, § 174.

the former owners. But it is not necessary that the interest acquired should be an absolute one. It may be qualified, and to the extent of his interest, the claim of being a *bona fide* purchaser can be made good by pledgees,<sup>1</sup> brokers and factors,<sup>2</sup> common carriers and other bailees, in their representative capacity as well as on account of their own interests in the goods.<sup>3</sup>

*In the second place*, the interest must be acquired for a valuable consideration. Some thing of value must be parted with,<sup>4</sup> or some contingent liability like a guaranty, acceptance or indorsement, must be assumed by the party acquiring the interest in the goods.<sup>5</sup>

Although there are a few cases which maintain that a pre-existing debt is a sufficient consideration to make an attaching creditor a *bona fide* purchaser,<sup>6</sup> the better opinion is that it is not sufficient because there is no parting with value in reliance upon the title to the goods thus acquired,<sup>7</sup>

<sup>1</sup> *Attenborough v. London, etc., Dock Co.*, L. R. 3 C. P. D. 450; *Thrall v. Lathrop*, 30 Vt. 307; *Babcock v. Lawson*, L. R. 4 Q. B. D. 394; *s. c.* 5 Q. B. D. 284; *Carpenter v. Hale*, 8 Gray, 157; *Arendale v. Morgan*, 5 Sneed, 703.

<sup>2</sup> *Fowler v. Hollins*, L. R. 7 Q. B. D. 616; *Newcomb-Buchanan Co. v. Baskett*, 14 Bush, 658.

<sup>3</sup> *Hall v. Hinks*, 21 Md. 206; *Caldwell v. Bartlett*, 3 Duer, 341; *Old Dominion S. S. Co. v. Burckhardt*, 31 Gratt. 664; *Attenborough v. London, etc., Dock Co.*, L. R. 3 C. P. D. 450; *Pease v. Gloahee*, L. R. 1 P. O. 220; *Keyser v. Harbeck*, 3 Duer, 373.

<sup>4</sup> *Mears v. Waples*, 3 Houst. 581; *Hoffman v. Noble*, 6 Met. 68; *Attenborough v. London, etc., Dock Co.*, L. R. 3 C. P. D. 450; *Ohio, etc., Co. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Dows v. Rush*, 28 Barb. 157; *Hall v. Hinks*, 21 Md. 406.

<sup>5</sup> *Wood v. Yeatman*, 15 B. Mon. 271; *Barnard v. Campbell*, 58 N. Y. 73; *Caldwell v. Bartlett*, 3 Duer, 341. One is not a *bona fide* purchaser because he has given notes for the purchase-money, until he has been forced to pay something on them to the holder. *Matson v. Melchor*, 42 Mich. 477.

<sup>6</sup> *Shufeldt v. Pease*, 16 Wis. 685; *Rice v. Cutler*, 17 Wis. 362; *Butters v. Haughwout*, 42 Ill. 18. See *Titcomb v. Woods*, 38 Me. 563; *Pease v. Gloahee*, L. R. 1 P. C. 220.

<sup>7</sup> *Weaver v. Barden*, 49 N. Y. 286; *Stevens v. Brennan*, 79 N. Y. 254;

and that an attaching or other creditor is not a *bona fide* purchaser,<sup>1</sup> unless the debt was incurred subsequently and upon the credit of the goods,<sup>2</sup> or some thing of value has been given in the way of security, such as notes in consideration of the transfer of property;<sup>3</sup> or where additional property is given to the transferrer as part consideration of the transfer.<sup>4</sup> And the same rule has been applied to assignees in bankruptcy,<sup>5</sup> and assignees for the benefit of creditors.<sup>6</sup>

Finally, the purchaser must take the goods in good faith and without notice of the defect in his vendor's title.<sup>7</sup> But not only must he be without knowledge of the defect, but he must not even know facts which are calculated to arouse the suspicion of a reasonably prudent man that everything

Hyde v. Ellery, 18 Md. 496; Fletcher v. Drath, 66 Mo. 126; Sargent v. Sturm, 23 Cal. 359; Root v. French, 13 Wend. 570; Farley v. Lincoln, 51 N. H. 577; Adams v. Smith, 5 Cow. 280; Devoe v. Brandt, 53 N. Y. 462; Nelson v. Rockwell, 14 Ill. 375; Piper v. Elwood, 4 Denio, 195; Pope v. Pope, 40 Miss. 516; Poor v. Woodburn, 25 Vt. 235; Barnard v. Campbell, 58 N. Y. 73, 76.

<sup>1</sup> Jordan v. Parker, 56 Me. 557; Poor v. Woodburn, 25 Vt. 234; Field v. Stearns, 42 Vt. 106; Wiggin v. Day, 9 Gray, 97; Oswego Starch Factory v. Lendrum, 57 Iowa, 573; Atwood v. Dearborn, 1 Allen, 483; American, etc., Express Co. v. Willsie, 79 Ill. 92; Whitman v. Merrill, 125 Mass. 127; Naugatuck Cutlery Co. v. Babcock, 22 Hun, 481; Buffington v. Gerrish, 15 Mass. 158; Bradley v. Obear, 10 N. H. 477; Hackett v. Callender, 32 Vt. 97; Fitzsimmons v. Joslin, 27 Vt. 129; Mowry v. Walsh, 8 Cow. 245; Sargent v. Sturm, 23 Cal. 359; Devoe v. Brandt, 53 N. Y. 462.

<sup>2</sup> Thompson v. Rose, 16 Conn. 71; Bradley v. Obear, 10 N. H. 477.

<sup>3</sup> Paddon v. Taylor, 44 N. Y. 371.

<sup>4</sup> Kingsbury v. Smith, 13 N. H. 109.

<sup>5</sup> Montgomery v. Bucyrus Machine Works, 92 U. S. 257; Donaldson v. Farwell, 93 U. S. 631.

<sup>6</sup> Belding v. Frankland, 8 Lea, 67, 72; Ratcliffe v. Langston, 18 Md. 383, 390; Bussing v. Rice, 2 Cush. 48; Farley v. Lincoln, 51 N. H. 579. But see Gibson v. Moore, 7 B. Mon. 92; Barrett v. Warren, 3 Hill, 350.

<sup>7</sup> Lynch v. Beecher, 38 Conn. 490; Allison v. Matthew, 3 Johns. 235; Meacham v. Collignon, 7 Daly, 402; Rataan v. Bernard, 3 Blatchf. 244; Stearns v. Gage, 79 N. Y. 102.

was not right.<sup>1</sup> And he is a *bona fide* purchaser only to the extent of the consideration which he has transferred before learning of the defect of title. He cannot claim to be a *bona fide* holder as to the consideration which he transfers after knowledge of the defect.<sup>2</sup>

The burden of proof is on the party who claims the protection of a *bona fide* purchaser.<sup>3</sup>

The *bona fide* purchaser takes the title so fully purged of the defect that he is able to transfer a good title even to one who cannot claim to be a *bona fide* purchaser,<sup>4</sup> unless he is the man with whom the defect of title originated, as, for example, where he was the fraudulent vendee, from whom the *bona fide* purchaser took his title.<sup>5</sup>

<sup>1</sup> Cochran v. Stewart, 21 Minn. 435; Devoe v. Brandt, 53 N. Y. 462; Green v. Humphrey, 50 Pa. St. 212; Loeb v. Flash, 65 Ala. 526; Caldwell v. Bartlett, 8 Duer, 353. See Kern v. Thurber, 57 Ga. 175.

<sup>2</sup> Dows v. Kidder, 84 N. Y. 121.

<sup>3</sup> Devoe v. Brandt, 53 N. Y. 462; Lynch v. Beecher, 38 Conn. 490; Porter v. Parks, 49 N. Y. 464; Leod v. First Nat. Bank, 42 Miss. 99. But see Mears v. Waples, 8 Houst. 581.

<sup>4</sup> Grout v. Hill, 4 Gray, 361, 368; Trull v. Bigelow, 16 Mass. 406.

<sup>5</sup> Schutt v. Large, 6 Barb. 373.

## CHAPTER XXII.

### REMEDIES FOR THE BREACH OF THE CONTRACT OF SALE.

SECTION. 331. General statement.

332. Sellers' remedies in executed contracts—Measure of damages.

333. Seller's remedies *in personam* in executory contracts—Measure of damages.

334. Seller's remedy against the goods—His resale of the goods.

335. Buyer's remedies for the seller's breach of the contract—Non-delivery of the proper goods—Measure of damages.

336. Buyer's claim to special or consequential damages.

336. Buyer's action for specific performance.

§ 331. General statement. — In all contracts of sale, there are involved contingent and collateral liabilities, such as the liability for the breach of conditions and warranties, and for fraud in the making of the contract, for which appropriate remedies are provided, apart from the remedies for the direct breach of the contract of sale. But these collateral remedies have been already fully explained in connection with the discussion of the subjects of fraudulent and conditional sales, and of warranties, and after referring the reader to the chapters, in which these remedies may be found explained,<sup>1</sup> it will be unnecessary to do more than to explain the nature of the remedies for the direct breach of the contract of sale. This part of the subject divides itself naturally into the seller's remedies and the buyer's remedies; and this natural subdivision of them will be observed in the succeeding discussion.

<sup>1</sup> For the remedies for fraud see §§ 162, 163; for breach of warranty, see § 197; and for breach of conditions, § 216.

§ 332. **Seller's remedies in executed contracts — Measure of damages.** — The seller's remedies are resorted to in consequence of the buyer's breach of the contract, and they vary according to the character of the buyer's breach, which may assume one of two forms, viz.: either he may refuse to receive the goods in pursuance of the contract, or, having received the goods, he may refuse or fail to pay the price.

Where the goods have been already delivered to the buyer, and his breach of the contract consists in his refusal or failure to pay the price, the seller's action against the buyer will be for the recovery of the price, although technically it may be stated that the action was for damages, for the buyer's breach of the contract. If the price has been fixed by the contract, the action will be for the fixed price; but if the contract does not provide the price, then the implied promise to pay the market value of the goods will be broken, and the action will be for the market value of the goods at the time of sale.<sup>1</sup> But if the goods were sold on a credit, the buyer does not commit a breach of his contract, unless he fails to pay at the expiration of the time of credit; and hence before the expiration of this time, no action can be maintained against the buyer for the

<sup>1</sup> *Konitzky v. Meyer*, 49 N. Y. 471; *Hill v. Hill*, 1 N. J. L. 261; *Morse v. Sherman*, 106 Mass. 430; *Scotten v. Sutter*, 37 Mich. 526; *Balley v. Smith*, 48 N. H. 141; *Althouse v. Alvord*, 28 Wis. 517. See *Gage v. Myers* (Mich.), 26 N. W. Rep. 470; *Mitchell v. Scott*, 41 Mich. 108; *McQueen v. Pamble*, 33 Mich. 344; *Dubois v. Delaware, &c., Canal Co.*, 4 Wend. 285; *Flanders v. Putney*, 28 N. H. 358; *Horn v. Batchelder*, 41 N. H. 86; *Moline Scale Co. v. Reed*, 52 Iowa, 307; *Hosley v. Scott*, 26 N. W. Rep. (Mich.) 659; *Bullock v. Finley*, 23 Fed. Rep. 514; *McBain v. Austin*, 16 Wis. 87; *Wineman v. Walters*, 53 Mich. 470, 472; *Rodman v. Guilford*, 112 Mass. 405; *Compton v. Parsons*, 76 Mo. 455; *Cheney-Bigelow Wire Works v. Sorrell*, 142 Mass. 442; *Overstreet v. Gallaher*, 42 Ark. 208; *McLennan v. McDermid*, 52 Mich. 468; *McAllister v. Safely*, 65 Iowa, 719; *Coit v. Schwartz*, 29 Kan. 344; *Britton v. Turner*, 6 N. H. 481; *Moulton v. Trask*, 9 Met. 577; *Hoagland v. Moore*, 2 Blackf. 167; *Moon v. Harder*, 38 Mich. 566; *Begole v. McKenzie*, 26 Mich. 470.

price, not even where the buyer is insolvent or has been guilty of fraud in the procurement of the contract,<sup>1</sup> unless the buyer had agreed to give security, when he would be guilty of a breach of an implied condition precedent to the provision for a credit, and in that case and for that reason the seller could sue immediately for the price, with perhaps a reasonable discount for the unexpired time of the credit.<sup>2</sup> So, also, if the buyer should refuse to accept the goods, after he had received a part of them, his refusal would, at the election of the seller, operate as a rescission of the original contract in which the provision for a credit was inserted; and in its place an implied contract to pay the value of the goods received would arise, which would enable the seller to bring an action immediately for the recovery of the value of the part of the goods which had been delivered to the buyer.<sup>2</sup>

§ 333. **Seller's remedies in personam in executory contracts — Measure of damages.** — If the contract of sale is executory, and remains so because the buyer refuses to accept any part of the goods, although they have been tendered to him in strict compliance with the contract, the seller has under the authorities his choice of three remedies.

<sup>1</sup> *Dellone v. Hall*, 47 Md. 112; *Sheriff v. McCoy*, 27 Up. Can. Q. B. 597; *Keller v. Strassburger*, 90 N. Y. 379; *s. c.* 23 Hun, 625; *Auger v. Thompson*, 3 Ont. App. 19; *Silliman v. McLean*, 13 Up. Can. Q. B. 544; *Magrath v. Tinning*, 6 Up. Can. Q. B. (o. s.) 484; *Kellogg v. Turple*, 2 Ill. App. 55; *Strutt v. Smith*, 1 *Cromp. M. & R.* 312; *Wakefield v. Gorrie*, 5 Up. Can. Q. B. 159, 168; *Bicknell v. Buck*, 58 Ind. 354; *Moriarty v. Stofferan*, 89 Ill. 528. But see *Dietz v. Sutcliff*, 80 Ky. 650; *Rice v. Andrews*, 33 Vt. 691, 694.

<sup>2</sup> *Hanna v. Mills*, 21 Wend. 90; *Rinehart v. Olwine*, 5 Watts & S. 157; *Manton v. Gammon*, 7 Bradw. 201; *Barron v. Mullin*, 21 Minn. 374; *Girard v. Taggart*, 5 Serg. & R. 19; *Carnahan v. Hughes*, 9 N. E. Rep. (Ind.) 79; *Hays v. Weatherman*, 14 Ind. 341; *Clodtfeldter v. Hulett*, 72 Ind. 187.

<sup>3</sup> See *Bartholomew v. Marwick*, 15 C. B. (n. s.) 711, 716; and see, further, *Wayne's Merthyr Steam Co. v. Morewood*, 47 L. J. Q. B. 746, 748, 749.

His first remedy is to treat the goods contracted for as still his own property, and sue the buyer for the damages which he has suffered, which would be estimated by ascertaining the difference between the contract price and the market value of the goods at the time and place of delivery.<sup>1</sup> If there is no market at the place of delivery then the value of the goods at the nearest market, *plus* the cost of transportation to the place of delivery, would be the true measure of damages.<sup>2</sup> The market price usually indicates the market value; but if there should be an undue inflation or depression of the price at the time of delivery, caused by unhealthy speculation, the market price would be an unreliable guide, and in fixing the market value, the court and jury should take into account these artificial fluctuations in the price.<sup>3</sup> The market value is determined by a reference to the time and place when the goods were to have been delivered, and not to the time when the buyer announced his determination not to take the goods.<sup>4</sup> This, however, is

<sup>1</sup> *Clement, &c., Co. v. Meserole*, 107 Mass. 362; *Young v. Merton*, 27 Md. 114; *Gibbons v. United States*, 8 Wall. 269; *Rand v. White Mountains R. R. Co.* 40 N. H. 79; *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11; *Northup v. Cook*, 39 Mo. 208; *Whelan v. Lynch*, 65 Barb. 329; 60 N. Y. 469; *Lanbach v. Lanbach*, 73 Pa. St. 392; *Hayden v. Demets*, 53 N. Y. 426; *Nixon v. Nixon*, 21 Ohio St. 114; *Danforth v. Walker*, 37 Vt. 289.

<sup>2</sup> *Washington Ice Co. v. Webster*, 68 Me. 463; *Rice v. Manley*, 66 N. Y. 82; *East Tenn., &c., R. R. Co. v. Hale*, 85 Tenn. 69; *McHose v. Fulmer*, 73 Pa. St. 365; *Griffith v. Colver*, 16 N. Y. 489; *Capen v. De Stieger Glass Co.*, 105 Ill. 185. But see *Equitable Gas Light Co. v. Balt. Coal Tar, &c., Co.*, 65 Md. 73, and *Culin v. Woodbury Glass Works*, 108 Pa. St. 220, where it is held that other equitable rules for the measurement of damages, where from the rarity of the goods its market value cannot be ascertained. See, to the same effect, *Chicago v. Greer*, 9 Wall. 726; *McCormick v. Hamilton*, 23 Gratt. 561; *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Durst v. Burton*, 47 N. Y. 175. See *Thurman v. Wilson*, 7 Bradw. 312; *Paxton v. Meyer*, 58 Miss. 445.

<sup>3</sup> See *Kountz v. Kirkpatrick*, 72 Pa. St. 376; *Cahen v. Platt*, 69 N. Y. 348; *Stark v. Alford*, 49 Tex. 260; *Trout v. Kennedy*, 47 Pa. St. 398; *Durst v. Burton*, 47 N. Y. 167.

<sup>4</sup> *Phillipots v. Evans*, 5 M. & W. 475; *Follansbee v. Adams*, 86 Ill. 13; *Kadish v. Young*, 108 Ill. 170.



only the guide where the seller has prepared himself to deliver the goods called for by the contract. But if the contract was for the manufacture and the sale of an article, and the buyer countermands his order before the manufacture of the article is completed, it is not necessary for the seller to complete the manufacture of the article and then tender the finished article to the buyer, in order to hold the latter liable on his contract. The seller may, if he chooses, on receiving the countermand of the buyer's order, discontinue the work on the goods ordered, and bring an action against the buyer for the damages he has suffered from the countermand.<sup>1</sup> The difference between the contract price and the market value of the manufactured article is not in that case the measure of damages but the actual damage suffered by the manufacturer in the cost of raw material and the expenditure of labor on the article.<sup>2</sup>

*In the second place*, although there are authorities to the contrary,<sup>3</sup> it seems to be the prevailing rule in America that the seller may consider the goods to be the property of the buyer, notwithstanding there has been no acceptance of them by the buyer, and recover of the buyer the full price of the goods.<sup>4</sup> In England, it seems that the seller cannot,

<sup>1</sup> *Hosmer v. Wilson*, 7 Mich. 294; *James v. Adams*, 16 W. Va. 267; *McCormick v. Basal*, 46 Iowa, 235; *Pittsburg, &c. R., R. Co. v. Heck*, 50 Ind. 308; *Butler v. Butler*, 77 N. Y. 472; *Conihe v. N. Y. & N. E. R. R. Co.*, 20 N. Y. 495; *Allen v. Jarvis*, 20 Conn. 38; *Eckenrode v. Chemical Co.*, 55 Md. 51, 59; *Black v. Woodson*, 39 Md. 194; *Clement, &c., Mfg. Co. v. Meserole*, 107 Mass. 362; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; *Haines v. Tucker*, 50 N. H. 307; *Hughes' Case*, 4 Ct. of Cl. 64, 73; *Yates v. United States*, 15 Ct. of Cl. 119, 125; *Parker v. Pettit*, 48 N. J. L. 512, 517; *Hockster v. De La Tour*, 2 El. & B. 678.

<sup>2</sup> *Collins v. Delaporte*, 115 Mass. 162; *Hosmer v. Wilson*, 7 Mich. 294; *Gonson v. Madigan*, 13 Wis. 67; *Danforth v. Walker*, 37 Vt. 239; *McNaught v. Dodson*, 49 Ill. 446; *Rand v. White Mountain R. R. Co.*, 40 N. H. 79.

<sup>3</sup> See *Pittsburg, &c., R. R. Co. v. Heck*, 50 Ind. 308; *Indianapolis, &c., R. R. Co. v. Maguire*, 62 Ind. 140; *Fell v. Muller*, 78 Ind. 507; *Moody v. Brown*, 34 Me. 107.

<sup>4</sup> *Bement v. Smith*, 15 Wend. 493; *Doremus v. Howard*, 28 N. J. L.

in case of non-acceptance of the goods, recover the full price.<sup>1</sup> And it is very likely that most of the American cases are really exceptions to the general rule, which are recognized, because on account of the peculiar circumstances of the particular case a judgment for the difference between the market value and the contract price would not be an ample remedy. This would be the case where the goods were specially manufactured for the buyer, and it would be difficult, if at all possible, to find another purchaser for them.<sup>2</sup> So, also, where the market value cannot be ascertained, and therefore the difference between it and the contract price cannot be determined, it is held that the full price can be recovered.<sup>3</sup> But instead of treating the prop-

390; *Dustan v. McAndrew*, 44 N. Y. 72; *Bridgford v. Crocker*, 60 N. Y. 627; *Rodman v. Guilford*, 112 Mass. 405; *Higgins v. Murray*, 78 N. Y. 252; *Nichols v. Moore*, 100 Mass. 277; *Hunter v. Wetsell*, 84 N. Y. 549; *Frazier v. Simmons*, 139 Mass. 581; *Wade v. Moffet*, 21 Ill. 110; *Bell v. Offutt*, 10 Bush, 689; *Ballentine v. Robinson*, 46 Pa. St. 177; *Bagley v. Findlay*, 82 Ill. 524; *Donnell v. Hearn*, 12 Daly, 230; *Quick v. Wheeler*, 78 N. Y. 300; *Mason v. Decker*, 72 N. Y. 595; *Hayden v. Dewets*, 58 N. Y. 426; *Pollen v. Le Roy*, 30 N. Y. 549; *Pearson v. Mason*, 120 Mass. 53; *Chicago v. Greer*, 9 Wall. 726. But in order that the contract may be recovered, the vendor must fully prepare the goods for delivery. *Ganson v. Madigan*, 18 Wis. 67; *Pirdicaris v. Trenton City Bridge*, 39 N. J. L. 368; *Armstrong v. Turner*, 49 Md. 589; *Balley v. Smith*, 43 N. H. 141. And the seller must likewise show that the goods which he tenders in the performance of the contract are of the kind and quality called for by the contract. *Brewer v. Housatonic Ry. Co.*, 104 Mass. 593; *s. c.* 104 Mass. 277.

<sup>1</sup> See *Laird v. Pim*, 7 M. & W. 474, 478; *Barrow v. Arnaud*, 8 Q. B. 604, 610.

<sup>2</sup> *Gordon v. Norris*, 49 N. H. 383; *Pearson v. Mason*, 120 Mass. 53; *Goddard v. Binney*, 115 Mass. 450; *Black River Lumber Co. v. Warner*, 98 Mo. (1888) 374; *Allen v. Jarvis*, 20 Conn. 38; *Bookwalter v. Clark*, 11 Biss. C. C. 126; *Thorndike v. Locke*, 98 Mass. 340; *Thompson v. Alger*, 12 Met. 428; *Canada v. Wick*, 100 N. Y. 127; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Ballentine v. Robinson*, 46 Pa. St. 177.

<sup>3</sup> See *Phelps v. McGee*, 18 Ill. 158; *Bagley v. Findlay*, 82 Ill. 524; *Gordon v. Norris*, 49 N. H. 376; *Camp v. Hamlin*, 55 Ga. 259; *Williams v. Jones*, 1 Bush. 621; *James v. Adams*, 16 W. Va. 245; *Brownlee v. Bolton*, 44 Mich. 218; *Harris Mfg. Co. v. Marsh*, 49 Iowa, 11; *Sanborn v. Bene-*

§ 334 REMEDIES FOR BREACH OF CONTRACT. [CH. XXII.

erty as his own, or holding it as bailee for the buyer, and recover the contract price, resort may be had to the

§ 334. **Seller's remedy against the goods**—His resale of the goods,—that is, in case of non-acceptance of the goods, the seller may notify the buyer that he will sell the goods for the account of the buyer, and hold the latter liable for any difference between the contract price and the price obtained from the resale of the goods.<sup>1</sup> The right of resale may be exercised within a reasonable time after default by the buyer; and if delay is not unreasonable, it would not be necessary for the resale to be made immediately after the default, although the price of the goods may be on a steady decline.<sup>2</sup>

Although it is customary, as well as advisable, in order to forestall charges of unfairness, for the seller to give the

dict, 78 Ill. 309; *Haskell v. McHenry*, 4 Cal. 411; *McNaughter v. Cassaly*, 4 McLean, 530; *Haines v. Tucker*, 50 N. H. 307; *Foos v. Sabine*, 84 Ill. 565.

<sup>1</sup> *Van Horn v. Rucker*, 33 Mo. 391; *Crooks v. Moore*, 1 Sand. 297; *Lewis v. Greider*, 49 Barb. 606; *Adams v. Mirick*, 5 Serg. & R. 32; *White v. Kearney*, 9 Rob. (La.) 495, 501; *Williams v. Godwin*, 4 Sneed, 557; *Saladin v. Mitchell*, 45 Ill. 85; *Barnett v. Terry*, 42 Ga. 383; *Walker v. Gooch*, 10 Biss. 159, 163; *Bach v. Levy*, 50 N. Y. S. C. 519; *Youghiogeny Iron Co. v. Smith*, 66 Pa. St. 340, 344; *Johnson v. Powell*, 9 Ind. 566; *Judd, etc., Oil Co., v. Kearney*, 14 La. An. 352; *Rosenbaums v. Weeden*, 18 Gratt. 785; *Bogart v. O'Regan*, 1 E. D. Smith, 590; *Sands v. Taylor*, 5 Johns. 395; *Atwood v. Lucas*, 53 Me. 508; *Girard v. Taggart*, 5 Serg. & R. 19; *Dustan v. McAndrew*, 44 N. Y. 72; *Mason v. Decker*, 72 N. Y. 599; *Shawhan v. Van West*, 25 Ohio St. 490; *Young v. Mertens*, 27 Md. 114; *Bagley v. Findlay*, 82 Ill. 524; *Bell v. Offutt*, 10 Bush, 632; *Cook v. Brandels*, 3 Met. (Ky.) 557; *Holland v. Rea*, 48 Mich. 218; *Hayden v. Demets*, 53 N. Y. 431; *Haines v. Tucker*, 50 N. H. 313.

<sup>2</sup> *Smith v. Pettee*, 70 N. Y. 13; *George v. Glass*, 14 Up. Can. Q. B. 514; *Camp v. Hamlin*, 55 Ga. 259; *Linden v. Eldren*, 49 Wis. 305; *Rosenbaum v. Weeden*, 18 Gratt. 785; *Brownlee v. Bolton*, 44 Mich. 218; *Pickering v. Bardwell*, 21 Wis. 562. Two months' delay was held to be reasonable in *Tilt v. La Salle Silk Mfg. Co.*, 5 Daly, 20, and *Rosenbaum v. Weeden*, 18 Gratt. 785; and five months in *Saladin v. Mitchell*, 45 Ill. 79.

buyer notice of the time and place of the resale, it cannot be said to be necessary.<sup>1</sup> So, also, is it unnecessary for the resale to be by auction. Although the resale is usually by public auction, a private sale is sufficient.<sup>2</sup> All that is generally required of the seller, in his conduct of the resale, is that he shall in all his arrangements for the resale reasonably consider the interests of the buyer by securing the largest price possible for the goods.<sup>3</sup> The sale need not necessarily be held in the place of delivery; but it must ordinarily be held in some convenient and neighboring market. And if it is held in a distant market it would tend to support the charge of unfairness in the conduct of the resale.<sup>4</sup>

If the price obtained in the resale of the goods is less than the contract price, the difference may be recovered of the buyer in an appropriate action.<sup>5</sup> But if the sale was made

<sup>1</sup> See *Gaskell v. Morris*, 7 Watts & S. 32; *Bagley v. Findlay*, 82 Ill. 524; *Rosenbaums v. Weeden*, 18 Gratt. 785; *Van Horn v. Rucker*, 33 Mo. 391; *McClure v. Williams*, 5 Sneed, 718; *Redmond v. Smoek*, 28 Ind. 365; *Holland v. Rea*, 48 Mich. 218; *Saladin v. Mitchell*, 45 Ill. 76; *Lewis v. Greeder*, 49 Barb. 606; *Hickock v. Hoyt*, 33 Conn. 553; *Dollen v. Le Roy*, 30 N. Y. 549; *West v. Cunningham*, 9 Port. 104; *George v. Kimball*, 24 Up. Can. Q. B. 514.

<sup>2</sup> *Crooks v. Moore*, 1 Sandf. 297; *Lewis v. Greider*, 51 N. Y. 231; *McGibbon v. Schlessinger*, 18 Hun, 225; *Ullman v. Kent*, 60 Ill. 271; *Sands v. Taylor*, 5 Johns. 395; *Camp v. Hamlin*, 55 Ga. 259; *O'Brien v. Jones*, 47 N. Y. 67; *Brownlee v. Bolton*, 44 Mich. 218; *Smith v. Pettee*, 70 N. Y. 13, 18; *Lindon v. Eldred*, 49 Wis. 305; *Pollen v. Le Roy*, 30 N. Y. 549.

<sup>3</sup> See *Dunston v. McAndrew*, 44 N. Y. 72; *White v. Kearney*, 14 La. Ann. 352; *Bagley v. Findlay*, 82 Ill. 524.

<sup>4</sup> *Chapman v. Ingram*, 30 Wis. 290; *Rickey v. Tenbroeck*, 63 Mo. 568.

<sup>5</sup> *Sands v. Taylor*, 5 Johns. 395; *Schultz v. Bradley*, 4 Daly, 29; *Hunter v. Wetsell*, 84 N. Y. 549; *Phelps v. Hubbard*, 51 Vt. 489; *McLean v. Richardson*, 127 Mass. 839; *Lamkin v. Crawford*, 8 Ala. 153; *Young v. Mertens*, 27 Md. 126; *Bartley v. New Orleans*, 30 La. An. 264; *Bell v. Offutt*, 10 Bush, 682; *Williams v. Godwin*, 4 Sneed, 557; *Van Horn v. Rucker*, 33 Mo. 491; *Rosenbaums v. Weeden*, 18 Gratt. 785; *Whitney v. Boardman*, 118 Mass. 242; *Jones v. Marsh*, 22 Vt. 144; *McGibbon v.*

without a previous notice to the buyer of the time and place of the resale, the disposition of the courts seems to be, in obedience to the charge of unfairness, to disregard the price obtained at the resale as a test of the market value of the goods, and adopt some other standard of value, for the purpose of determining the difference between it and the contract price.<sup>1</sup>

§ 335. **Buyer's remedies for the seller's breach of contract — Non-delivery of the proper goods — Measure of damages.** — If the seller fails to deliver the goods in accordance with his contract of sale, the buyer can sue him for non-delivery, and recover damages of him. And, ordinarily, if the price has not been paid, the damages will be estimated by the difference between the contract price and the market value at the time and place of delivery.<sup>2</sup>

Schlessinger, 18 Hun, 225; Lewis v. Greider, 51 N. Y. 231. The necessary expenses of the resale would, of course, be deducted first from the price obtained, before calculating the difference between that price and the contract price. See Thurman v. Wilson, 7 Bradw. 312.

<sup>1</sup> See Girard v. Taggart, 5 Serg. & R. 32; Chapman v. Ingram, 30 Wis. 290; Rickey v. Tenbroeck, 63 Mo. 587; Haskell v. McHenry, 4 Cal. 411; McCombs v. McKennan, 2 Watts & S. 219; Coffman v. Hampton, 2 Watts & S. 390. See Granberry v. Frierson, 2 Baxt. 326, for a statement of the liability of the seller, when the contract price is less than the price obtained in the resale.

<sup>2</sup> Sleuter v. Wallbaum, 45 Ill. 44; Grand Tower Co. v. Phillips, 23 Wall. 471; Miles v. Miller, 12 Bush, 134; Somers v. Wright, 115 Mass. 292; Burnham v. Roberts, 70 Ill. 19; Bush v. Holmes, 53 Me. 417; Chadwick v. Butler, 28 Mich. 349; Marsh v. McPherson, 105 U. S. 709; Guice v. Crenshaw, 60 Tex. 344; Gray v. Hall, 29 Kan. 704; Kribs v. Jones, 44 Md. 396; Parsons v. Sutton, 66 N. Y. 92; Kountz v. Kirkpatrick, 72 Pa. St. 376; Gordon v. Norris, 49 N. H. 376; Rose v. Bozeman, 41 Ala. 678; Worthen v. Wilmot, 30 Vt. 555; Lush v. Druse, 4 Wend. 313; Harrison v. Glover, 72 N. Y. 451; Hanna v. Harter, 2 Ark. 397; Bush v. Canfield, 2 Conn. 487; West v. Pritchard, 19 Conn. 215; Phelps v. McGee, 18 Ill. 155; Capen v. De Steiger Glass Co., 105 Ill. 185; Behner v. Dale, 25 Ind. 433; Cannon v. Folsom, 2 Iowa, 101; Stewart v. Power, 12 Kan. 596; Miles v. Miller, 12 Barb. 134; Marchesseau v. Chaffee, 4 La. Ann. 24; Camden, &c., Oil Co. v. Schleus, 59 Md. 31; Bartlett v. Blanchard, 13 Gray, 429; McKercher

And if the goods are to be delivered in installments at successive times, the damages will be ascertained by adding together the differences between the contract price of the installments and their market values on their respective days of delivery.<sup>1</sup> But it must be borne in mind that the buyer need not wait until the seller's failure to deliver the last installment, but he may treat the failure to deliver any one of the installments as a breach of the contract and bring his action immediately.<sup>2</sup>

If no time and place of delivery are provided for, then the market value of the time and place of sale should be compared with the contract price, in the measurement of damages.<sup>3</sup> And if there is no market at the place of delivery, resort should be had, as in the case of the seller's remedies, to the value of the goods at the nearest market, plus the cost of transportation to the place of delivery.<sup>4</sup>

*v. Curtis*, 85 Mich. 478; *Stevens v. Ryford*, 7 N. H. 360; *Gregory v. McDowell*, 8 Wend. 435; *Davis v. Shields*, 24 Wend. 326; *McKnight v. Dunlop*, 1 Seld. 537; *Clark v. Dales*, 20 Barb. 42; *Van Allen v. Illinois Central R. R. Co.*, 7 Bosw. 515; *White v. Tompkins*, 52 Pa. St. 363; *Hill v. Chapman*, 59 Wis. 211; *Doak v. Snapp*, 1 Coldw. 180; *Listen v. Windmuller*, 20 Jones & Sp. 408; *Fishell v. Winans*, 38 Barb. 228; *Dana v. Fielder*, 12 N. Y. 40; *Beals v. Terry*, 2 Sandf. 127; *Dey v. Dox*, 9 Wend. 120; *Rand v. White Mountain R. R. Co.*, 40 N. H. 79; *White v. Salisbury*, 38 Mo. 150; *Essex Co. v. Pacific Mills*, 14 Gray, 389; *Shaw v. Nudd*, 8 Pick. 9; *Smith v. Berry*, 18 Me. 122; *Arrowsmith v. Gordon*, 3 La. An. 106; *Porter v. Barrow*, 3 La. An. 140; *Gray v. Hall*, 29 Kan. 704; *Jemison v. Gray*, 29 Iowa, 537; *Collum v. Huntington*, 51 Ind. 229; *Kent v. Ginter*, 23 Ind. 1; *Deere v. Lewis*, 51 Ill. 254; *Smith v. Dunlap*, 12 Ill. 184; *Wells v. Abernethy*, 5 Conn. 227; *Crosby v. Watkins*, 12 Cal. 85.

<sup>1</sup> *Johnson v. Allen*, 78 Allen, 387; *Hill v. Chisman*, 59 Wis. 211; *Frost v. Knight*, L. R. 7 Exch. 111; *Boorman v. Nash*, 9 Barn. & C. 145, 152; *Tyers v. Rosedale, &c., Co.*, L. R. 8 Exch. 305; *Roper v. Johnson*, L. R. 8 C. P. 167; *Missouri Furnace Co. v. Cochran*, 8 Fed. Rep. 463; *Burtis v. Thompson*, 42 N. Y. 246; *Shreve v. Brewton*, 51 Pa. St. 176.

<sup>2</sup> *Hill v. Chipman*, 59 Wis. 211, 218.

<sup>3</sup> *Thompson v. Woodruff*, 7 Cold. 401; *Kipp v. Wiles*, 3 Sandf. 535. Or the market value may be taken at the time of demand of delivery, and the seller's refusal to deliver. *Williams v. Wood*, 16 Md. 220.

<sup>4</sup> *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Douglass v. Merceles*, 25

If the market value cannot be ascertained by any reasonable effort, then the damages must be estimated in some other way, in accordance with the general principles of equity.<sup>1</sup>

Where there is no variation between the contract price and the market value at the time and place of delivery, the seller is nevertheless guilty of a breach of contract in refusing to deliver the goods, and hence he will be liable in an action for nominal damages and the costs of the suit.<sup>2</sup>

But if the buyer has paid the contract price in full, the rule for the measurement of the damages varies with the authorities. According to one set of authorities, the buyer is entitled to receive as damages the market price at the time and place of delivery.<sup>3</sup> According to the other au-

N. J. Eq. 144; *Furlong v. Polleys*, 80 Me. 491; *McCormick v. Hamilton*, 23 Gratt. 561; *Rice v. Manley*, 66 N. Y. 82; *Hazelton Coal Co. v. Buck Mt. Coal Co.*, 57 Pa. St. 301; *Sellar v. Clelland*, 2 Col. 532; *Coxe v. England*, 65 Pa. St. 212; *Young v. Lloyd*, 65 Pa. St. 199; *Wemple v. Stewart*, 22 Barb. 154; *Berry v. Dwinel*, 44 Me. 255; *Cahen v. Platt*, 69 N. Y. 352; *Durst v. Burton*, 47 N. Y. 167. See Pa. R. R. Co. v. *Titusville Plank Road Co.*, 71 Pa. St. 350; *Hamilton v. McPherson*, 28 N. Y. 76; *Humphreysville, &c., Co. v. Vermont, &c. Co.*, 33 Vt. 92; *Beymer v. McBride*, 87 Iowa, 114; *Hopkins v. Sanford*, 41 Mich. 248.

<sup>1</sup> *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Cullin v. Woodbury Glass Works*, 108 Pa. St. 220; *Ramsay v. Tully*, 12 Bradw. 463; *Camden, &c., Oil Co. v. Schlens*, 59 Md. 31; *Bell v. Reynolds*, 78 Ala. 511; *Schouse v. Neiswaanger*, 18 Mo. App. 236; *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619; *McHose v. Fulmer*, 74 Pa. St. 367.

<sup>2</sup> *Bush v. Caufield*, 2 Conn. 485; *Rose v. Bozeman*, 41 Ala. 678; *Wilson v. Whitaker*, 49 Pa. St. 114; *Moses v. Rasin*, 14 Fed. Rep. 772; *Billings v. Vanderbeck*, 23 Barb. 546; *Maher v. Riley*, 17 Col. 415.

<sup>3</sup> *Shepherd v. Hampton*, 3 Wheat. 200; *Balto., &c., Co. v. Sewell*, 35 Md. 233; *Cofield v. Clark*, 2 Cal. 102; *Bear v. Harnish*, 3 Brewst. 116; *White v. Salisbury*, 33 Mo. 150; *Hill v. Smith*, 32 Vt. 433; *McKenney v. Haines*, 63 Me. 74; *Rose v. Bozeman*, 41 Ala. 678; *Smith v. Dunlap*, 12 Ill. 184; *Smithhurst v. Woolston*, 5 Watts & S. 106; *Humphreysville, &c., Co. v. Vermont, &c., Co.*, 33 Vt. 92; *Douglass v. McAllister*, 3 Cranch, 298.

thorities, the buyer is entitled to recover as damages the highest market price which has been reached any time between the time of delivery and the beginning of the action for damages.<sup>1</sup>

§ 336. **Buyer's claim to special or consequential damages.**—Very often the claim is made by the buyer that the seller's breach of the contract of sale has wrought upon him injurious consequences above and beyond the difference between the market value and contract price, and the right to additional damages in liquidation of this consequential injury is asserted. The answers of the courts to this query are not by any means harmonious. But after eliminating the irreconcilable cases, it is believed that the following statement of the law is reasonably accurate and reliable.

In the first place, the claim for special damages will not be recognized, if the seller did not know the use to which the thing bought was to be put, and hence could not reasonably be expected to anticipate in many particulars the consequences of his breach of the contract.<sup>2</sup> And it is also required, as the foundation for a claim to special damages,

<sup>1</sup> *Dabovich v. Emeric*, 12 Cal. 171; *West v. Pritchard*, 19 Conn. 212; *Cannon v. Folsom*, 2 Iowa, 101; *Meyer v. Wheeler*, 65 Iowa, 390; *Kent v. Ginten*, 23 Ind. 1; *Van Allen v. Illinois Cent. R. R. Co.*, 7 Bosw. 515; *Suydam v. Jenkins*, 3 Sandf. 614; *Randon v. Barton*, 4 Tex. 289; *Brasher v. Davidson*, 31 Tex. 190; *Gregg v. Fitzhugh*, 36 Tex. 127; *Ranger v. Hearne*, 37 Tex. 80; *Cartwright v. McCook*, 33 Tex. 612; *Caloit v. McCadden*, 18 Tex. 324; *Bank of Montgomery v. Reese*, 26 Pa. St. 143 (the rule applied only to stocks, the other rule being applied to the breach of other contracts of-sale, see *supra*); *Arnold v. Suffolk Bank*, 27 Barb. 424; *Clark v. Pinney*, 7 Cow. 687; *West v. Wentworth*, 3 Cow. 82; *Gilman v. Andrews*, 66 Iowa, 116; *Stapleton v. King*, 40 Iowa, 278; *Davenport v. Wells*, 1 Iowa, 598; *Maher v. Riley*, 17 Cal. 415. In South Carolina, the buyer can recover the ruling market price on demand of delivery of the stock. *Davis v. Richardson*, 1 Bay, 105.

<sup>2</sup> *Bartlett v. Blanchard*, 13 Gray, 429; *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360; *Fessler v. Love*, 48 Pa. St. 407; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 388.



that the complaint or declaration of the plaintiff must allege such damages.<sup>1</sup> The authorities seem also to be agreed that mere speculative profits, which the buyer claims to have been able to earn, if he had gotten the goods, and which depend upon the rise and fall in price, could not be taken into account in estimating the amount of damages to which the buyer is entitled for the seller's breach of the contract.<sup>2</sup> But the profits, which one reasonably and reliably anticipates from the possession and manipulation of the goods bought, are considered as much a part of the contract of sale, as the claim to any actual increase in value at the time of delivery over the contract price. And hence the prevailing rule of law permits the recovery of such profits as special or consequential damages.<sup>3</sup> For example, if a gardener or farmer buys seeds, warranted to be of a certain kind and quality, the vendor of the seed is liable on the breach of that warranty for the loss of profits which the buyer would have without any reasonable doubt gained from the sale of his crop, if the seed had been of

<sup>1</sup> *Parsons v. Sutton*, 66 N. Y. 92; *Miles v. Miller*, 12 Bush, 138; *Coffield v. Clark*, 2 Cal. 102; *Furlong v. Polleys*, 30 Me. 491; *Stevens v. Lyford*, 7 N. H. 360.

<sup>2</sup> *Ferris v. Comstock*, 33 Conn. 513; *Berger v. New Orleans*, 35 La. Ann. 523; *Howe Machine Co. v. Bryson*, 44 Iowa, 159; *White v. Miller*, 71 N. Y. 118; *Jones v. Lathrop*, 7 Col. 1; *Wolcott v. Mount*, 36 N. J. L. 262; *s. c.* 38 N. J. L. 496; *Pennypacker v. Jones*, 106 Pa. St. 237; *Houston, &c., R. R. Co. v. Hill*, 63 Tex. 381; *Brigham v. Carlisle*, 78 Ala. 243; *McKinnon v. McEwan*, 48 Mich. 106.

<sup>3</sup> *Masterton v. Mayor of Brooklyn*, 7 Hill, 62; *Fox v. Harding*, 7 Cush. 516; *Royalton v. Royalton, &c., Co.* 14 Vt. 311; *Richmond v. Dubuque, &c., R. R. Co.*, 40 Iowa, 264; *s. c.* 43 Iowa, 422; *Burrell v. N. Y., &c., Co.*, 14 Mich. 84; *Cook v. Comrs. of Hamilton Co.*, 6 McLean, 612; *Hubbard v. Rowell*, 51 Conn. 423; *Kendall, &c., Co. v. Commissioners*, 79 Va. 563; *Bell v. Reynolds*, 78 Ala. 511; *United States v. Behan*, 110 U. S. 338; *Fairchild v. Rogers*, 32 Me. 269; *Nat. Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535; *Jones v. Foster*, 67 Wis. 296; *McHose v. Fulmer*, 73 Pa. St. 365; *United States v. Speed*, 8 Wall. 77; *Hoy v. Grenoble*, 34 Pa. St. 9; *McAndrews v. Tippet*, 39 N. J. 105; *Develin v. Mayor, &c.*, 63 N. Y. 8; *Morrison v. Lovejoy*, 6 Minn. 224.

the kind it was represented to be.<sup>1</sup> In other cases, special damages were allowed, where the vendor of manure failed to deliver the quantity called for by the contract and in consequence the yield of the land thus imperfectly manured, was less than that of contiguous land which had been properly prepared;<sup>2</sup> where a gas company had wrongfully refused to supply a storekeeper with illuminating gas;<sup>3</sup> and where an ice dealer failed to supply a butcher with the amount of ice the latter had contracted for, in consequence of which he lost a large amount of his fresh meat.<sup>4</sup>

§ 337. **Buyer's action for specific performance.** — The action for specific performance of a contract is an equitable remedy, which the court of equity applies whenever the common-law action for damages proves to be an inadequate remedy. The purpose of this equitable remedy is, as its name implies, to compel a specific performance of the contract of sale by a delivery of the goods in accordance with the terms of the contract. This action is so peculiarly a matter of equity practice, that its full treatment is considered as belonging more properly to a treatise on equity jurisprudence.

In the case of sales of personal property in general, the presumption of law is that the common-law action is adequate;<sup>5</sup> and in order that the claim to the equitable remedy may be substantiated, the plaintiff must prove the fact that his case constitutes an exception to the general rule.

<sup>1</sup> *Passenger v. Thorburn*, 34 N. Y. 634; *White v. Miller*, 7 Hun, 427; *s. c.* 71 N. Y. 118; *s. c.* 78 N. Y. 393; *Flick v. Weatherbee*, 20 Wis. 392. To the same effect, see *Jones v. George*, 61 Tex. 345. But see, *contra*, *Hurley v. Buchl*, 10 Lea, 346.

<sup>2</sup> *Bell v. Reynolds*, 78 Ala. 511.

<sup>3</sup> *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318.

<sup>4</sup> *Hammer v. Schoenfelder*, 47 Wis. 455.

<sup>5</sup> See cases cited in large numbers in 3 Pom. Eq. Jur., § 1402, note.

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But having established this fact, he is then entitled to a judgment or decree for specific performance.<sup>1</sup>

<sup>1</sup> Sale of a slave, *Sarter v. Gordon*, 2 Hill, 121; *Young v. Barton*, 1 McMull. Eq. 255; sale of patent rights, *Binney v. Annan*, 107 Mass. 95; *Corbin v. Tracy*, 34 Conn. 325; *Satterthwait v. Marshall*, 4 Del. Ch. 337; *Sumerby v. Buntin*, 118 Mass. 287; sale of coal tar under peculiar circumstances, *Equitable Gas Light Co. v. Balt. Coal Tar Co.*, 63 Md. 285; shares of stock, *Leach v. Fobes*, 11 Gray, 506; *Todd v. Loft*, 7 Allen, 371; *Frue v. Houghton*, 6 Col. 818; *Ashe v. Johnson*, 2 Jones, Eq. 149; *Johnson v. Brooks*, 93 N. Y. 337. But in *Foll's Appeal*, 91 Pa. St. 434, specific performance was denied to a buyer of stock, where it was shown that his object was to acquire thereby the control of the corporation.

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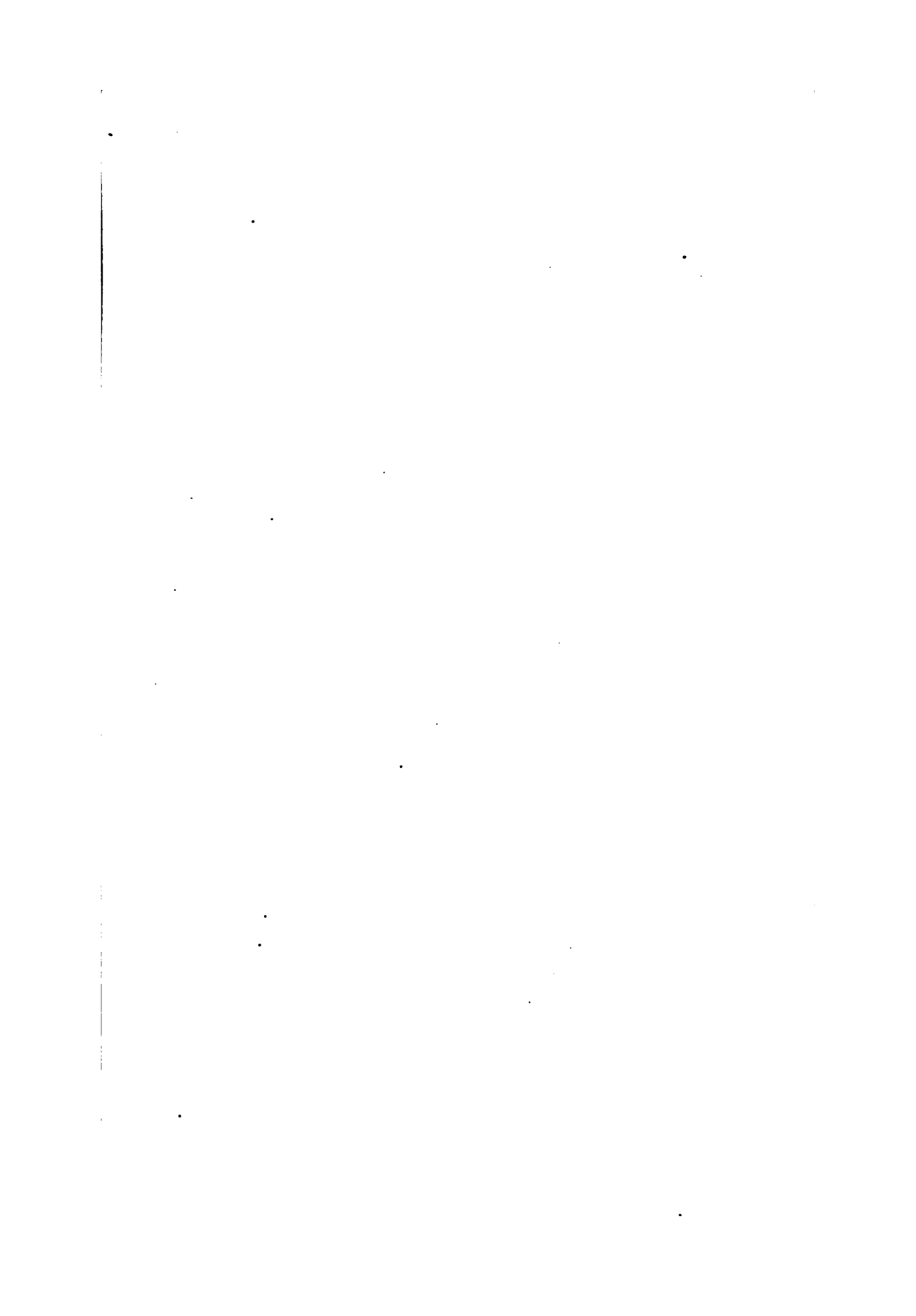
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